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In the

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-663

TURNPIKE REALTY COMPANY, INC.,
PETITIONER,

*v.*

TOWN OF DEDHAM, MASSACHUSETTS,
RESPONDENT.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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# In the Supreme Court of the United States

OCTOBER TERM, 1972

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TURNPIKE REALTY COMPANY, INC.,
PETITIONER,

*v.*

TOWN OF DEDHAM, MASSACHUSETTS,
RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

The petitioner, Turnpike Realty Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of Massachusetts entered on June 26, 1972, in the matter of *Turnpike Realty Company, Inc.* v. *Town of Dedham.*

### Opinion Below

The decision from which review is sought is reported at 1972 Massachusetts Advance Sheets 1303-1318; a copy of said opinion is included in the Appendix to this petition.* The opinion of the Massachusetts Land Court, which was

* The page numbers in the official report have been marked with brackets, and all references herein are to the official report.

the trial court in this matter, is unreported; a copy of said opinion is also included in the Appendix to this petition.

## Prior Orders in This Court

The decision from which review is sought was entered on June 26, 1972. On September 18, 1972, Associate Justice Brennan extended the time for filing a petition for writ of certiorari to and including October 30, 1972.

## Jurisdiction

This Court has jurisdiction to review the judgment of the Massachusetts Supreme Judicial Court under the terms of 28 U.S.C. section 1257 (3) in that the petitioner is claiming rights and privileges under the constitution of the United States.

## Questions Presented

1. Must a town which enacts a by-law that diminishes the value of property by 88% and which prevents any effective use thereof compensate the owner of that property?
2. Must a town compensate the owner of land whose property value is adversely affected by flood plain zoning when the purpose of the zoning is to conserve land and not to protect life or property?
3. Is a town's flood plain zoning which affects land values a valid use of the police power if the purpose of the zoning is the saving of future, hypothetical expenses to the town?
4. Is a town's flood plain zoning a valid use of the police power when there is affirmative evidence showing that the legislative body which enacted it failed to consider whether or not the operation of the zoning regulation is calculated to protect lives or property or the financial well-

being of the town, notwithstanding that such purposes are stated in the body of the zoning regulation?

5. Does a state statute which authorizes zoning on lands "deemed subject to seasonal or periodic flooding," enable a town to zone land which becomes flooded only by the deliberate and conscious acts of a government agency?

6. If a town enacts flood plain zoning designed to protect property from the effects of a government-operated hazard, and where that hazard was created subsequent to the purchase of the property by the affected owner, must the town compensate the owner thereof for any diminution in the value of the property caused by such regulation?

7. Is a town zoning regulation valid which provides that variances therefrom may be obtained only if certain facts are proved "to the satisfaction" of the town Board of Appeals?

8. Where a by-law requires a town to find that land is subject to flooding before that land can be included in a flood plain zone, may the town include land which is not subject to flooding on the grounds that the owner thereof would probably not find it practical to use the land because of its proximity to other, flood-controlled, land?

## Constitutional and Statutory Provisions

### Fourteenth Amendment to the Constitution Of the United States.

"Section 1 . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The remaining provisions, because of their length, are set forth in the Appendix to this petition. They include the following:

1. Chapter 40A, Mass. General Laws, section 2.
2. Chapter 40A, Mass. General Laws, section 3.
3. Chapter 40A, Mass. General Laws, section 4 (pertinent provisions).
4. Chapter 40A, Mass. General Laws, section 21 (pertinent provisions).
5. By-Law adopted by Town of Dedham, Massachusetts, at 1963 Annual Town Meeting (pertinent provisions).

## Statement of the Case

The petitioner has owned approximately 62 acres of vacant land in Dedham, Massachusetts, since 1947. The land consists of four parcels (determined by elevation): one parcel of lowlands (i.e., below 98 feet of elevation) of 53 acres, one parcel of uplands of 6.3 acres; and two parcels, noncontiguous, of uplands totalling 3.4 acres (hereinafter, and in the decisions below, referred to as the "knolls"). In 1962, the Conservation Commission of the Town of Dedham hired an engineer to devise a zoning map for the town so that the town could determine which areas should be subject to special zoning by being designated as "flood plain districts". The engineer prepared such a map, and indicated by a legend on the map and in testimony that the so-called flood plain district should include all areas shown in green thereon and that such areas all lay below 98 feet in elevation; the engineer inadvertently indicated the "upland" knolls in green as well. A year later, the town adopted a zoning by-law establishing so-called flood plain districts. That by-law is set forth in detail in the Appendix hereto, but in essence limits the use of said land. The by-law specifically incorporated the map prepared by the engineer in establishing the flood plain district.

In 1959, a bascule gate was erected on the Charles River near the property as one of several gates to control the height of the River, which flows from Dover through Dedham to Boston. The evidence, which was contested by the respondents, showed that virtually all flooding of the petitioner's lands was caused by the manipulation of this gate in the process of regulating the height of the Charles River, and not by natural causes.

The petitioner introduced evidence that in passing the zoning regulation, the Town's Conservation Commission, the Planning Board, and the Town Meeting (the necessary bodies for enacting such zoning), all considered conservation—as compared with conditions of safety or economic savings—as the primary basis for the Regulation.

The petitioner also introduced evidence that the restrictions on the land under this flood plain zoning by-law decreased the value of the petitioner's land from $431,000 to $53,000, a reduction of 88%.

## Proceedings Below

The federal issues presented in this Petition were raised in a Proceeding brought in the Land Court under chapter 185, Mass. G.L., § 1 (j ½) and chapter 240, Mass. G.L., § 14A to review a zoning ordinance. The federal issues were presented first by Requests for Rulings to the Land Court, and then by exceptions taken to the decision of that Court. A copy of the petitioner's Requests for Rulings, and of its exceptions, are included in the Appendix to this petition. (The Land Court's rulings on the petitioner's requests were all enunciated on the last page of that Court's decision. App. 52.)

1. The petitioner's claim that the diminution of the value of its land constituted an unconstitutional taking was raised in its Requests for Ruling numbers 25, 45-47, 50

and 51; and in exception number 13; Requests 45 to 47 were allowed; the exceptions were adversely ruled upon by the Supreme Judicial Court at pages 1314 to 1316 of its Opinion.

2. The petitioner's claim that the flooding caused by an agency of the state (the bascule gate) was not within the scope of the state enabling statute and was not properly the subject of police regulation, was raised in its Requests for Ruling numbers 7, 8, 11, 15 and 38; and in exceptions numbers 8, 9, 10, 14 and 18; the exceptions were adversely ruled upon by the Supreme Judicial Court at pages 1306 to 1307 of its Opinion.

3. The petitioner's contention that its property was taken without due process when the knolls were inadvertently included in the engineer's map was raised in its Requests for Ruling numbers 36 and 52; and in exceptions numbers 3 and 23; the exceptions were adversely ruled upon by the Supreme Judicial Court at pages 1316 to 1317 of its Opinion.

4. The petitioner's contention that the purposes of the flood plain zoning district as enacted by the Town of Dedham were not purposes for which the police power could [then] be used and that therefore the by-law was confiscatory and deprived the petitioner of property without due process and Equal Protection clauses of the Fourteenth Amendment was raised in its Requests for Ruling numbers 26, 36, 40, 48, 49, 50, 51, 52, 53 and 54; and in exceptions numbers 1, 3, 11, 12, 19, 20 and 27; the exceptions were adversely ruled upon by the Supreme Judicial Court at pages 1305 to 1311 of its Opinion.

5. The petitioner's contention that the flood plain by-law contains no statutory or administrative standard for permission to erect buildings within a flood plain district and therefore violates the due process and Equal Protection clauses of the Fourteenth Amendment was raised in

its Requests for Ruling numbers 33-35, 54 and 55; and in exceptions numbers 16, 17, 22 and 27; the exceptions were adversely ruled upon by the Supreme Judicial Court at pages 1310 to 1311 of its Opinion.

## Reasons for Granting the Writ

### I. The Decision Below Presents a Federal Question of Substance in an Area of Increasing Litigation in Appellate State Courts, But Which Has Not Been Decided by This Court.

Flood plain zoning presents a constellation of issues which have been confronted in various ways by state courts but never by this Court, e.g. *State* v. *Johnson*, 265 A.2nd 711 (Maine 1970); *Dooley* v. *Town Plan and Zoning Commission of Fairfield*, 151 Conn. 304, 197 A.2nd 770 (1964); *Morris County Land Improvement Co.* v. *Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2nd (1963).[1]

Related cases before this Court have explicitly reserved the question presented by the case at bar. For instance, in *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962), this Court confronted a claimed diminution of value caused by a zoning ordinance, but declared, "How far regulation [with respect to diminution] may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot

[1] There has in addition been an unusual amount of commentary on the subject. E.g., Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967); Dunham, *Flood Control Via the Police Power*, 107 U. Pa. L. Rev. 1098 (1959); Comment, *Ecological and Legal Aspects of Flood Plain Zoning*, 20 Kans. L. Rev. 268 (1972); Comment, *State Flood Plain Zoning*, 12 DePaul L. Rev. 246 (1963); Sax, *Takings and the Police Power*, 74 Yale L. J. 36 (1964).

in question." 369 U.S. at 594. In the present case, however, such evidence of loss was abundant; the State Court decided as a matter of law to ignore it. 1972 Mass. Adv. Sh. at 1315-1316.[2]

It is also evident that this Court in *Goldblatt*, contrary to the implication of the Supreme Judicial Court at 1315, did not regard the case of *Hadacheck* v. *Los Angeles*, 239 U.S. 412 (1915), as dispositive in this type of situation. In *Hadacheck*, the Court approved a zoning ordinance which caused operations on affected land to become more expensive: specifically the ordinance therein had the effect of requiring brick clay to be removed from the property before it could be made into bricks. "In the present case," ruled this Court, "there is no prohibition of the removal of brick clay; only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, an opinion on such questions, we reserve." 239 U.S. at 412. The case at bar presents the issue reserved by this Court in *Hadacheck*, for unlike *Hadacheck*, the land cannot be used for its intended residential purpose;[3] unlike *Goldblatt*, there is evidence of devaluation.

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[2] That the right to compensation is a question of degree was emphatically emphasized by Mr. Justice Holmes in *Penna. Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), where the Court awarded damages to a coal company which had been deprived by statute of the right to mine coal under private residences. "The general rule is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions." 260 U.S. at 415-416. See Michelman, *supra*, at 1190, n. 53.

[3] The concurring judge in the opinion below, (at page 1318), alluded to the fact that the petitioner might still apply for a special

The purposes for which the zoning was allegedly passed are delineated in the preamble of the by-law, and summarized by the Supreme Judicial Court at pages 1307 to 1309 of its Opinion. Four purposes were stated:

> "[1] to preserve and maintain the ground water table; [2] to protect the public health and safety, persons and property against the hazards of flood water inundation; [3] for the protection of the community against the costs which may be incurred when unsuitable development occurs in swamps, marshes, along water courses, or in areas subject to floods; [4] and to conserve natural conditions, wild life, and open spaces for the education, recreation and general welfare of the public."

The first and second purposes are discussed in Part II, below. The fourth purpose, conservation for its own sake, was acknowledged by the Massachusetts Court at 1309 to be an inadequate reason for the by-law. As discussed in Part II, the petitioner introduced affirmative evidence to show that the fourth reason—conservation—was in fact the reason for the enactment of this by-law.

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permit within the terms of the by-law. In so far as the fact of the zoning has already reduced the number of interested developers and the value of the land, and in so far as the zoning subjects the petitioner to an undefined procedure with no standards for seeking such permit under paragraph 4 of the by-law, the petitioner has been deprived of substantial property rights already. In so far as the petitioners must use any administrative procedure at all in order to use the knolls it has been deprived of the use of its property without due process, since even the Supreme Judicial Court acknowledged that their inclusion was inadvertent. 1972 Adv. Sh. at 1316. In any event, the timeliness of the petitioner's application for certiorari has already been ruled upon in an analogous situation, *Euclid* v. *Ambler Co.*, 272 U.S. 365, 386 (1926), and it is not necessary for the petitioner to test the willingness of the Town to grant exceptions to its by-law.

This Court has not previously had the opportunity to decide the issues presented by the third purpose. In *Euclid* v. *Ambler Co.*, 272 U.S. 365, *supra*, this Court alluded to financial savings to the community as one possible use of the police power, but in that and successive cases the Court dealt with the fundamental economic structure of the community, and not a narrowly circumscribed saving which was unrelated to the general economy of the affected community. 272 U.S. at 391 to 395.

This case also presents a novel question revolving around the bascule bridge. The evidence was to the effect that with minimal exceptions, the flooding to which the land was subject was caused by manipulation of a bascule bridge which was built and operated by the government after the acquisition of the land by the petitioner. Hence the flooding which the by-law seeks to prevent is not natural flooding, but rather governmental flooding. This type of flooding was not included in the basic enabling statute, Mass. G.L. c. 40A, §2; additionally, as a matter of constitutional law, the petitioner urges that the government must reimburse property holders for the effects of Regulation designed to correct damage from a government agency. Both the Land Court, App. 38-39 and the State Supreme Court, at 1306-1307, skirted this issue and have left the constitutional question undecided.

The inclusion of the knolls was completely inadvertent and was admitted by the Respondents in the Land Court to be such. App. 37; their inclusion within the district as a mere matter of administrative convenience does not support the use of the police power, and the courts' endorsement of this flies in the face of the Fourteenth Amendment. App. 37. Opinion of the Supreme Judicial Court at 1316-1317.

## II. The Decision Below Has Decided Federal Questions of Substance Which Are Not in Accord With Applicable Decisions of This Court.

As to the first and second purposes cited in the preamble, the by-law had no rational relation to the purposes allegedly to be served by it. The petitioner acknowledges that in the absence of any evidence to the contrary, this Court will presume the regularity of the use of the police power. *E.g., United States* v. *Carolene Products Co.*, 304 U.S. 144, 148 (1938). However, the Massachusetts Court departed from this Court's holdings by refusing to consider the evidence that was in fact presented, such as transcripts of public hearings, as well as evidence concerning the nature of the testimony before the legislation bodies. As the Land Court decision, App. 38-39, and the Supreme Judicial Court decision, pp. 1305-1306, show, the courts below explicitly held that such evidence and a determination based thereon was irrelevant: characterizing all of the petitioner's arguments in this regard as no more than arguments concerning motive, the Court below peremptorily disposed of this issue by declaring, "The validity of this by-law does not hinge upon the motives of its supporters." at 1305-1306. The Court at no further point dealt with the petitioner's argument that the by-laws did not in fact preserve health or property or affect the water table, except for a cursory footnote at p. 1308.[4] This footnote is of particular significance because of the absence generally of any authority for the proposition that curtailment of construction affects the water table.

The Court also erred in its deviation from this Court's reliance on ascertainable standards of review. The by-law

[4] "It appears that the first purpose, preserving and maintaining the ground water table, is related to preventing depletion of the water supply."

in paragraph 4 provides that building permits may be issued in the event, *inter alia*, that certain facts are "proven to the satisfaction of the Board of Appeals." The word "satisfaction" affords neither a standard of application nor a measure of proof. The Court attempted to answer this question by alluding to a statute providing for judicial review, at 1311, but failed to address itself to the absence of a standard to be applied by the Board in its deliberations. Of particular interest is a 1967 decision of the Massachusetts Court which held that an arrest of one who failed "to give a satisfactory account" of himself was invalid because, *inter alia*, of the "imprecision inherent in the word 'satisfactory'. No statutory guidance is supplied or even hinted at as to what constitutes a satisfactory account." *Alegata* v. *Commonwealth*, 353 Mass. 287, 231 N.E.2d 201 (1967).

## Conclusion

For these reasons, a Writ of Certiorari should be issued to review the judgment and decision of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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## APPENDIX A

## SUPREME JUDICIAL COURT

[1303] TURNPIKE REALTY COMPANY, INC. *vs.* TOWN OF DEDHAM.

Norfolk. April 6, 1972. — June 26, 1972.

Present: TAURO, C.J., SPIEGEL, BRAUCHER, & HENNESSEY, JJ.

*Zoning*, Flood plain zoning, Wetlands, Special permit, Validity. *Constitutional Law*, Zoning, Due process of law, Eminent domain, Police power. *Eminent Domain*, What constitutes taking.

Case heard in the Land Court by *Silverio*, J.

SPIEGEL, J. The petitioner, the owner of 61.9 acres of land in Dedham, brought this petition in the Land Court under the provisions of G. L. c. 185, § 1(j1/2), and c. 240, § 14A, to determine, inter alia, the validity of an amendment to a zoning by-law as applied to the land of the petitioner. The judge in his decision ruled that the by-law "was a valid exercise of the authority and powers conferred upon the respondent . . . by . . . [G. L. c.] 40A and is in full force and effect as to the petitioner's land." The case is here on the petitioner's exceptions to several of the judge's findings and to his denial of a number of the petitioner's requests for rulings.

The petitioner acquired the land in question in 1947. It is made up of uplands and lowlands and includes two knolls, one of 3.2 acres and the other of .2 acres, which rise above the elevation of the petitioner's lowland. The land is bounded by Route 1, the Boston-Dedham boundary line, the Charles River, and the Mother Brook. At the annual [1304] town meeting in 1963 the respondent amended its "zoning by-laws and [z]oning [m]ap by adopting a zoning by-law establishing a "Flood Plain District," which included "the

land of the petitioner, except for a minor portion thereof." Prior to the amendment the entire area involved in this case was in a general residence zoning district. The judge found that the knolls were included in the flood plain district. The remaining land of the petitioner is "a low swampy area" bordering on the Charles River.

Pertinent portions of the by-law, with paragraph numbers added by us for clarity of reference, are as follows: "[1] The purpose of the Flood Plain District is to preserve and maintain the ground water table; to protect the public health and safety, persons and property against the hazards of flood water inundation; for the protection of the community against the costs which may be incurred when unsuitable development occurs in swamps, marshes, along water courses, or in areas subject to floods; and to conserve natural conditions, wild life, and open spaces for the education, recreation and general welfare of the public. [2] Within a Flood Plain District no structure or building shall be erected, altered or used, and no premises shall be used except for one or more of the following uses: Any woodland, grassland, wetland, agricultural, horticultural, or recreational use of land or water not requiring filling. Buildings and sheds accessory to any of the Flood Plain uses are permitted on approval of the Board of Appeals. Notice of each such Flood Plain building permit application shall be given to the Town Public Works Department, to the Town Board of Health, to the Town Planning Board, and to the Town Conservation Commission as well as all other parties required. [3] The Board of Appeals, in hearing such application, shall consider, in addition to any other factors said Board deems pertinent, the following aspects with respect to flooding and Flood Plain District zoning provisions: that any such building or structure shall be designed, placed, and constructed to offer a minimum obstruction to the flow of water; and that it shall be firmly

anchored to prevent floating away. [4] If any land in the Flood Plain district [1305] is proven to the satisfaction of the Board of Appeals after the question has been referred to the Planning Board, the Board of Health, and the Board of Selectmen, and reported on by all three boards or the lapse of thirty days from the date of referral without a report, as being in fact not subject to flooding or not unsuitable because of drainage conditions for any use which would otherwise be permitted if such land were not, by operation of this section, in the Flood Plain district, and that the use of such land for any such use will not interfere with the general purposes for which Flood Plain districts have been established, and will not be detrimental to the public health, safety, or welfare, the Board of Appeals may, after a public hearing with due notice, issue a permit for any such use. [5] Except as provided above, there shall be in the Flood Plain District: No land fill or dumping in any part of the District. No drainage other than Flood Control works by an authorized public agency. No damming or relocation of any water course except as part of an over-all drainage basin plan. No building or structure. No permanent storage of materials or equipment. [6] In any Flood Plain District after the adoption of this provision, no land, building, or structure shall be used for sustained human occupancy except dwellings theretofore lawfully existing, or land, buildings or structures which comply with the provisions of this by-law."

The petitioner attacks the validity of the by-law on several grounds. Many of its arguments overlap. We treat with its central contentions as it has presented them in its brief.

1. A recurrent argument throughout the petitioner's brief is that the prime purpose of the by-law was to "retain . . . [its] land in its natural state and as a flood water detention basin." It appears to rely to a considerable extent on vari-

ous statements made by members of the Dedham conservation commission which suggest that their primary interest in urging the adoption of the by-law was for the above reasons. This demonstrates, it argues, that the by-law was "not regulatory, but confiscatory."

The validity of this by-law does not hinge upon the motives [1306] of its supporters. See *Caires* v. *Building Commr. of Hingham*, 323 Mass. 589, 596. The reasons for the creation of the Flood plain district are clearly set forth in the by-law itself. There is no need to speculate about the "prime purpose" of the by-law. Whether the stated purposes are within the authority granted by the Zoning Enabling Act, G. L. c. 40A, is a question which we will consider in the course of this opinion.

2. The petitioner takes the position that lands which are not subject to flooding from "natural" causes cannot or should not be included in a flood plain district, and that the judge's rulings denying the petitioner's requests on this point were erroneous.[1] It admits that its land was on occasions "covered with water" because of the overflow from the Charles River but charges this to mismanagement of the Mother Brook bascule gate[2] by one Salvatore Trementozzi, an employee of the Metropolitan District Commission. The petitioner seeks to characterize this flooding as "artificial."

The Mother Brook bascule gate was completed in 1959 as part of flood control work on the Charles River to reduce the effect of flooding. Trementozzi testified that when the

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[1] These requests were: "7. The word 'flooding' in the enabling statute . . . means flooding from natural causes. . . . 11. The enabling statute does not authorize the inclusion of lands in a Flood Plain district which are not subject to seasonal or periodic flooding from natural causes."

[2] Webster's Third New Intl. Dictionary defines "bascule" as follows: "[A]n apparatus or structure in which one end is counterbalanced by the other on the principle of the seesaw or by weights."

gate is lowered, water is diverted into Mother Brook; when it is raised, water remains in the Charles River. He also testified that he made the decision "on a regular basis" whether to raise or lower the gate. On certain dates when the petitioner's land was flooded, Trementozzi decided not to lower the gate. The petitioner argues that the flooding over its land could have been prevented by "proper" operation of the gate. The evidence, however, in no way suggests that Trementozzi's management of the gate was unreasonable, or that "the locus was . . . an area which was being utilized by Trementozzi, at the expense of the petitioner, for public purposes."

[1307] Although the judge did not make explicit findings of fact on this point, it is clear that he considered the petitioner's contention. In any event, we are of opinion that the judge was correct in denying the petitioner's requests for rulings on this issue.

3. The petitioner argues that "the enactment of the by-law was arbitrary, capricious and unreasonable and went beyond the authority granted in the last sentence of" c. 40A, § 2, which reads as follows: "A zoning . . . by-law may provide that lands deemed subject to seasonal or periodic flooding shall not be used for residence or other purposes in such a manner as to endanger the health or safety of the occupants thereof."

The preamble of the by-law sets out its purposes: (numbers added for clarity of reference) "[1] to preserve and maintain the ground water table; [2] to protect the public health and safety, persons and property against the hazards of flood water inundation; [3] for the protection of the community against the costs which may be incurred when unsuitable development occurs in swamps, marshes, along water courses, or in areas subject to floods; [4] and to conserve natural conditions, wild life, and open spaces for the education, recreation and general welfare of the public."

We first state our view that the last sentence of G. L. c. 40A, § 2, does not in any way limit the authority of a municipality to enact a flood plain zoning by-law. Even before the last sentence became part of the enabling act,[3] we believe that a municipality could validly have enacted a flood plain zoning by-law under the general grant of authority in G. L. c. 40A, § 2 (to promote the "health, safety, convenience, morals or welfare"), and for the reasons set forth in G. L. c. 40A, § 3 ("to secure safety from fire, panic and other dangers"). See Dunham, Flood Control Via the Police Power, 107 U. of Pa. L. Rev. 1098, 1118-1121. Although it might be argued that such authority to enact flood plain zoning could not be implied before the insertion of the last sentence of G. L. c. 40A, § 2, and that we must therefore [1308] regard the objective of such flood plain zoning as limited to the protection of "occupants" of residences on land subject to flooding, we think it "just as logical to regard . . . [the last sentence of G. L. c. 40A, § 2] as a clarification of an ambiguity and a legislative interpretation of the original act." See *Fitz-Inn Auto Parks, Inc.* v. *Commissioner of Labor & Indus.* 350 Mass. 39, 42. We believe that the test governing the validity of a flood plain zoning by-law or ordinance is the same as that governing any other zoning by-law or ordinance. "The test is whether there has been shown any substantial relation between the amendment and the furtherance of any of the general objects of the enabling act. *Caires* v. *Building Commr. of Hingham,* 323 Mass. 589, 593. *Lamarre* v. *Commissioner of Pub. Works of Fall River,* 324 Mass. 542, 545. The promotion of the public welfare, as that term is fairly broadly construed, is chief among the purposes of the enabling statute." *Lanner* v. *Board of Appeal of Tewksbury,* 348 Mass. 220, 228.

[3] The sentence was added by St. 1954, c. 368, § 2, as part of a general revision of the Zoning Enabling Act.

More specifically, three basic public policy objectives of restricting use of flood plains have been advanced: (1) the protection of individuals who might choose, despite the flood dangers, to develop or occupy land on a flood plain; (2) the protection of other landowners from damages resulting from the development of a flood plain and the consequent obstruction of the flood flow; (3) the protection of the entire community from individual choices of land use which require subsequent public expenditures for public works and disaster relief. See Dunham, Flood Control Via the Police Power, 107 U. of Pa. L. Rev. 1098, 1110-1117.

The first three stated purposes of the by-law are consistent with these objectives.[4] The fourth purpose would fall into the category of "[a]esthetic considerations." *Barney & Carey Co.* v. *Milton*, 324 Mass. 440, 448. In the *Barney and Carey* case, we said: "Aesthetic considerations may not be disregarded in determining the validity of a zoning by-law, but they do not alone justify restrictions upon private [1309] property merely for the purpose of preserving the beauty of a neighborhood or town." Furthermore, we said: "Regard for the preservation of the natural beauty of a neighborhood makes the enactment of a zoning regulation desirable but does not itself give vitality to the regulation." Since the by-law is fully supported by other valid considerations of public welfare, the additional purpose of conserving "natural conditions, wild life, and open spaces" does not bring it into conflict with the enabling act.

The petitioner asserts that several other portions of the by-law are unreasonable and unduly burdensome. We do not agree. Paragraph 2 limits the uses of land in a flood plain district: "Within a Flood Plain District no structure

[4] It appears that the first purpose, preserving and maintaining the ground water table, is related to preventing depletion of the water supply.

or building shall be erected, altered or used, and no premises shall be used except for one or more of the following uses: Any woodland, grassland, wetland, agricultural, horticultural, or recreational use of land or water not requiring filling. Buildings and sheds accessory to any of the Flood Plain uses are permitted on approval of the Board of Appeals." Paragraph 3 contains specific considerations for the board of appeals in entertaining applications for construction of "accessory" buildings: i.e., "that any such building or structure shall be designed, placed, and constructed to offer a minimum obstruction to the flow of water; and that it shall be firmly anchored to prevent floating away." Paragraph 4 contains a separate and much broader exception than the "accessory" building exception of paragraph 2: "If any land in the Flood Plain district is proven to the satisfaction of the Board of Appeals after the question has been referred to the Planning Board, the Board of Health, and the Board of Selectmen, and reported on by all three boards or the lapse of thirty days from the date of referral without a report, as being in fact not subject to flooding or not unsuitable because of drainage conditions for any use which would otherwise be permitted if such land were not, by operation of this section, in the Flood Plain district, and that the use of such land for any such use will not interfere with the general purposes for which Flood Plain districts have been established, and will not be detrimental to the [1310] public health, safety, or welfare, the Board of Appeals may, after a public hearing with due notice, issue a permit for any such use." The petitioner asserts that these three paragraphs are conflicting. It contends that the board of appeals would be without authority to grant a permit for an "accessory" building (paragraph 2) "for it must be proven, under paragraph 4, to its 'satisfaction' that the land is not subject to flooding; and, therefore, any provision

that a building provide a minimum obstruction to the flow of water or be anchored to prevent its floating away (as in paragraph 3) is in conflict with paragraph 4." Similarly, it claims, the board could not grant a permit under paragraph 4 for any "use which would otherwise be permitted if such land were not . . . in the Flood Plain district" if such use does not meet the requirements of paragraph 3, or is contrary to the uses permitted in paragraph 2.

The judge correctly reconciled paragraphs 2 through 4 by distinguishing between the special permit procedure applicable to "accessory" buildings, and the special permit procedure relating to land "not subject to flooding or not unsuitable because of drainage conditions." The two procedures are independent. Restrictions concerning the water flow and anchoring make sense only when related to "accessory" buildings. Paragraph 4, by contrast, was intended to prevent injustice resulting from the establishment of zoning districts based on "the physical characteristics of substantial areas." *Leahy* v. *Inspector of Bldgs. of New Bedford,* 308 Mass. 128, 132. An example of the type of situation where a landowner might resort to the procedure under paragraph 4 would be the two "knolls" on the petitioner's land which rise above the general level of the swamp.

4. The petitioner contends that several aspects of the by-law are vague and ambiguous. It argues that the phrase "Except as provided above" in paragraph 5 (which, inter alia, denies the right to fill, build, or permanently store materials or equipment) could refer to any of the four previous paragraphs. We think it clearly refers to the two types of special permits set out in paragraphs 2, 3 and 4. For instance, if the petitioner were granted a special permit to [1311] build an "accessory" building, paragraph 5

would not prevent it from filling its land for this purpose.

The petitioner particularly objects to the phrase "to the satisfaction of the Board of Appeals" in paragraph 4. It argues that there is no standard to measure "satisfaction" and thus an owner is subject to the "caprice and whim of men." As we have recently stated in the case of *MacGibbon* v. *Board of Appeals of Duxbury*, 356 Mass. 635, 637-638: "The delegation of authority to the board of appeals to act on applications for special permits for exceptions to the zoning by-law cannot leave the decision subject to the 'untrammeled discretion' or 'unbridled fiat' of the board. . . . The Zoning Enabling Act and the by-law together must provide adequate standards for the guidance of the board in deciding whether to grant or to withhold special permits . . . . The standards need not be of such a detailed nature that they eliminate entirely the element of discretion from the board's decision." In the *MacGibbon* case, we concluded that sufficient standards for the board of appeals were contained in G. L. c. 40A, § 4, and § 8(d) of the Duxbury by-law, which provided that: "[t]he Board of Appeals may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the by-law in harmony with their general purpose and intent, and in accordance with the specified rules contained in this by-law." In the instant case, the standards to be applied by the board are at least as precise. The board must find that the land is not subject to flooding or not unsuitable because of drainage conditions for a particular use; and that such use will not interfere with the general purposes of the flood plain district, and will not be detrimental to the "public health, safety, or welfare." Moreover, the decision of the board is subject to judicial review under G. L. c. 40A, § 21, and, as in the *MacGibbon* case, may be reversed if it is "based on a le-

gally untenable ground, or is unreasonable, whimsical, capricious or arbitrary." P. 639.

5. The petitioner further maintains that the special permit procedure is valueless because no permit under paragraph [1312] 4 for any use permitted by the underlying general residence zone could validly be granted because it would not be "in harmony with the general purpose and intent of the . . . by-law." G. L. c. 40A, § 4. If such permit were granted, the petitioner states, it would be "subject to annulment by action taken under [G. L.] c. 40A, § 16, by persons aggrieved or by mandamus proceedings."

The possibility that a special permit granted to a landowner would be contested in court and annulled does not render the by-law invalid. Moreover, in order for a special permit to be granted under paragraph 4, land would first have to be proven "not subject to flooding or not unsuitable because of drainage conditions." If this were the case, a special permit could be granted since it would not be in conflict with the general purpose of the by-law, which is to protect several classes of people from overdevelopment of land subject to flooding.

6. We next discuss the petitioner's contention that the by-law, both on its face and as applied to its particular land, is unconstitutional.

We have previously reviewed the purposes of the by-law and have determined that they comply with the authority granted by the enabling statute, G. L. c. 40A. To hold the by-law unconstitutional, we would have to hold that its terms are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid* v. *Ambler Realty Co.* 272 U.S. 365, 395. *Wilbur* v. *Newton*, 302 Mass. 38, 39, and cases cited. "Every presumption is to be afforded in favor of the validity of . . . [a by-law] and if its reasonableness is fairly debatable the judgment of the local authorities who gave it

its being will prevail." *Schertzer* v. *Somerville*, 345 Mass. 747, 751, and cases cited. The petitioner must sustain a "heavy burden" of showing that the by-law is in conflict with (a) the enabling act, G. L. c. 40A, or (b) applicable constitutional provisions. *Pierce* v. *Wellesley*, 336 Mass. 517, 521.

The general necessity of flood plain zoning to reduce the damage to life and property caused by flooding is unquestionable. See Dunham, Flood Control Via the Police Power, [1313] 107 U. of Pa. L. Rev. 1098, Note, Flood Plain Zoning for Flood Loss Control, 50 Iowa L. Rev. 552; Comment, State Flood-Plain Zoning, 12 De Paul L. Rev. 246; Comment, Zoning the Flood Plains of Ohio, 1969, U. Toledo L. Rev. 655. See also Task-Force on Federal Flood Control Policy, A Unified National Program for Managing Flood Losses, 1966 H. R. Doc. No. 465, 89th Cong., 2d Sess., 3. The principal criterion as to the reasonableness of the inclusion of the petitioner's land in the flood plain district is the extent of the flood hazard to its land. The judge's decision on this point contains the following: "There was extensive evidence on elevation, topography, dams, flood control, flood gates all bearing on the issue whether or not the locus was subject to 'seasonal' or 'periodic' flooding; this included photographs, exhibits reflecting the elevation of the locus in relation to the Charles River . . . as well as evidence concerning the level of the Charles River from 1954 to 1967 . . . . The evidence indicated that there was a reasonable basis for the judgment of the town meeting that the land to be included in the 'Flood Plain District' is, in fact, subject to seasonal or periodic flooding and that the detemination of the Town Meeting that the locus was subject to flooding was not unreasonable or capricious. A view of the locus further supported this testimony and disclosed that most of the locus consisted of lowlands covered with marshgrass and scrub growth. The only apparent areas on

'high' ground within the locus consisted of the 3.2 acre and .2 acre knolls."

The evidence clearly supported the judge's conclusion. One Robert A. Barrows, an expert hydrologist, testified for the respondent that, in his opinion, the petitioner's land "will have water on it, ranging anywhere from practically nothing up to . . . three feet of water annually." He further testified that once the flow in the Charles River exceeds 1,280 cubic feet a second, which is equivalent to the approximate elevation of the petitioner's land (92.5 feet), the petitioner's land will be flooded. The flow of the Charles River, according to Barrows, exceeded that level in 1936, 1938, 1955 and 1968. Barrows stated that he personally went to [1314] the petitioner's land in March, 1968, and observed that it was covered with "approximately four to five feet of water."

As we have stated, the restrictions in the by-law serve to protect not only those who might choose to develop or occupy the land in spite of the dangers to themselves and their property (see *Pinnick* v. *Cleary*, Mass. , — ,[4] and cases cited), but also other people in the community from the harmful effects of flooding.[5] Similarly, there is a substantial public interest in avoiding the public works and disaster relief expenditures connected with flooding.

In *Vartelas* v. *Water Resources Commn.* 146 Conn. 650, 654, the court stated: "The police power regulates use of property because uncontrolled use would be harmful to the public interest. Eminent domain, on the other hand, takes private property because it is useful to the public."

The petitioner, moreover, has not been deprived of all beneficial uses of its property. The by-law specifically permits "Any woodland, grassland, wetland, agricultural,

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[4] Mass. Adv. Sh. (1971) 1129, 1150-1151.

[5] Barrows testified that if the petitioner's land was filled, this "could cause the water to rise higher at other points."

horticultural or recreational use of land or water not requiring filling." Although it is clear that the petitioner is substantially restricted in its use of the land, such restrictions must be balanced against the potential harm to the community from overdevelopment of a flood plain area. In *Morris County Land Improvement Co.* v. *Township of Parsippany-Troy Hills*, 40 N.J. 539, , ,[b] a case heavily relied upon by the petitioner, the court stated: "There is no substantial evidence in this case that the matter of intramunicipal flood control had any bearing on the adoption of the meadows zone regulations. . . . This case, therefore, does not involve the matter of police power regulation of the use of land in a flood plain on the lower reaches of a river by zoning, building restrictions, channel encroachment lines or otherwise and nothing said in this opinion is intended to pass upon the validity of any such regulations."

7. The petitioner introduced testimony of an expert witness [1315] that prior to the enactment of the by-law the best use of the petitioner's land was for apartment buildings, and after the enactment the best use was for agriculture. He further testified that the value of the lowlands was $431,000 prior to becoming subject to the by-law, and $53,000 after the by-law's enactment, a reduction in value of about eighty-eight per cent. The petitioner argues that the reduction was of such magnitude that the enactment of the by-law must be considered the equivalent of a taking without just compensation.

The judge after referring to the testimony of the petitioner's expert as set out above stated that "[t]he respondent's witness testified that the value of the lowlands was not affected by the Flood Plain District as the nature of the terrain was such as to make the construction of

[b] 193 Atl. 2d 232, 242, fn. 3.

housing on the locus under the General Residence Zone not economically feasible."

The transcript shows there was evidence contrary to the figures stated by the petitioner's expert. Although the judge in his decision made references to the testimony of both the petitioner's and the respondent's witnesses regarding the value of the land before and after the enactment of the by-law, he did not set any value thereon. He stated: "Although there was a substantial diminution in value of the locus, the mere decrease in the value of a particular piece of land is not conclusive evidence of an unconstitutional deprivation of property."

"There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant . . . it is by no means conclusive, see *Hadacheck* v. *Sebastian* . . . [239 U. S. 394], where a diminution in value from $800,000 to $60,000 was upheld." *Goldblatt* v. *Hempstead,* 369 U. S. 590, 594. See *Euclid* v. *Ambler Realty Co.* 272 U. S. 365. See also *Caires* v. *Building Commr. of Hingham,* 323 Mass. 589, 594; *Massachusetts Broken Stone Co.* v. *Weston,* 346 Mass. 657, 661; *Anderson* v. *Wilmington,* 347 Mass. 302, 304. But see *Dooley* v. *Town Plan & Zoning Commn. of Fairfield,* 151 Conn. 304, 310.

[1316] We realize that it is often extremely difficult to determine the precise line where regulation ends and confiscation begins. The result depends upon the "peculiar circumstances of the particular instance." *Pittsfield* v. *Oleksak,* 313 Mass. 553, 555. In the case at bar we are unable to conclude, even though the judge found that there was a substantial diminution in the value of the petitioner's land, that the decrease was such as to render it an unconstitutional deprivation of its property.

8. The petitioner argues that the finding and ruling of the judge that the 3.2 acre and .2 acre knolls were included

in the flood plain district and subject to the by-law was contrary to the evidence. However, the evidence on this point was conflicting. The town engineer, at the request of the town conservation commission, made a zoning map as it related to flood plain districts. He was instructed to put in the flood district "all the swamp areas" below ninety-eight feet, and to designate them by coloring them green. The elevations of the knolls were 121 feet and 111 feet. Both were colored in the flood plain district despite elevations in excess of ninety-eight feet. They were shown as colored on the map at the town meeting which adopted the by-law. The town clerk testified that the map he submitted to the Attorney General was a "true copy of the Flood Plain District as created by vote of the Town Meeting."

In finding and ruling that the knolls were included in the flood plain district, the judge appeared to reason that although their inclusion "may have been inadvertent," the petitioner "would not have been able to utilize these areas for the purposes authorized under the underlying zone (General Residence) without obtaining a special permit from the Board of Appeals for access to it over the surrounding flood plain district zone." We think this was a sensible conclusion. See *Parmenter* v. *Board of Appeals of Grafton,* Mass. .[c] As we have previously stated, this is a [1317] situation which the special permit procedure under paragraph 4 was intended to cover.

9. The petitioner argues that under G. L. c. 40A, § 2, the respondent was required to make a "reasonable determination" that land to be included in a flood plain district is in fact subject to seasonal or periodic flooding. It contends, in summary, that flood plain zoning is a radical departure from ordinary zoning concepts, and that the Legislature intended that a narrower standard of validity be used.

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[c] Mass. Adv. Sh. (1971) 1332.

We have previously stated our view that the authority to enact flood plain zoning by-laws is contained in the general grant of power to zone for the public health, safety, and welfare, and is not limited by the last sentence of G. L. c. 40A, § 2. There is nothing to indicate that our familiar rule should not apply: "'[a]ll rational presumptions are made in favor of the validity of every legislative enactment. Enforcement is to be refused only when it is in manifest excess of legislative power.' *Commonwealth* v. *Finnigan*, 326 Mass. 378, 379. *Massachusetts Commn. Against Discrimination* v. *Colangelo*, 344 Mass. 387, 390. *Coffee-Rich, Inc.* v. *Commissioner of Pub. Health*, 348 Mass. 414, 422." *Mobil Oil Corp.* v. *Attorney Gen.* Mass. , ,[4] The same is true of a zoning by-law. *Caires* v. *Building Commr. of Hingham*, 323 Mass. 589, 594. *Lanner* v. *Board of Appeal of Tewksbury*, 348 Mass. 220, 228. We find nothing wrong with the judge's ruling that the respondent "acted reasonably when, in the words of the [e]nabling [a]ct, it impliedly 'deemed' the locus to be subject to 'seasonal' or 'periodic' flooding." No express findings by the town meeting were required.

10. All of the petitioner's contentions have been considered. There was no error.

*Exceptions overruled.*

TAUBO, C.J. (concurring). The judge below has raised the question of "substantial diminution" in value without indicating the extent of the diminution. The majority [1318] opinion takes the position that the court is unable to conclude that the "substantial diminution" in value caused by the by-law was such as to render the by-law unconstitutional. In my view, this statement in the majority opinion might be used (possibly without justification) as a reason for the administrative denial of future petitions for special

[4] Mass. Adv. Sh. (1972) 561, 571.

building permits. For this reason, I would add the following statement to the opinion: "[W]e need not now decide whether the . . . [petitioner is] the 'uncompensated victim . . . of a taking invalid without compensation.' *Commissioner of Natural Resources* v. *S. Volpe & Co. Inc.* 349 Mass. 104, 111. That decision may depend in part on the board's . . . action on the . . . [possible petitioner's] application for . . . [a] special permit." *MacGibbon* v. *Board of Appeals of Duxbury*, 356 Mass. 635, 641.

*Antonio F. Iovino* for the petitioner.

*Herbert P. Wilkins* (*Acheson H. Callaghan, Jr., & Jeffrey Swope* with him) for the respondent.

*John A. Perkins*, Town Counsel, joined in a brief.

## APPENDIX B

### Land Court Decision.

This is a petition, as amended, brought under the provisions of General Laws, Chapter 185, Section 1 (j½) and Chapter 240, Section 14A, both as amended, in order to determine the validity of the amendment to the zoning by-law of the respondent Town of Dedham as set forth in the petition and "to interpret said by-law and the extent to which it affects the petitioner's use, enjoyment, improvement and development" of its land. The petitioner prays that the Court "declare said zoning by-law invalid, void and unconstitutional as applied to" the petitioner's land.

The respondent's answer, as amended, was in the nature of a general denial, except as to such portions of the amended pleadings of the parties, including statements made in open court, which admitted the following:

That the petitioner is a duly organized Massachusetts corporation which has brought the action under the aforementioned sections of the Mass. General Laws;

That the respondent at the annual Town Meeting of 1963 amended its zoning by-laws and Zoning Map by adopting a zoning by-law establishing a "Flood Plain District" and regulations with respect to said District entitled "Flood Plain Uses" which amendment was approved by the Attorney General and published according to the statute and purported to take effect as provided by law;

That the respondent in adopting the zoning by-law purported to act under the authority of General Laws, Chapter 40A, Section 2, providing in part "A zoning ordinance or by-law may provide that lands deemed subject to seasonal or periodic flooding shall not be used for residence or other purposes in such a manner as to endanger the health or safety of the occupants thereof";

That "the zoning by-law provides in part, 'The area sought to be placed in "Flood Plain District" at this time are described as follows: A. The low land bordering the Charles River, as shown on the map prepared by Pilling Engineering Co., entitled 'Proposed Flood Plain District' and dated 12/7/62, and designated as Area #1'; that the land of the petitioner, except for a minor portion thereof consisting of upland bordering on said Parkway, is included in said Area #1, and is subject to said zoning by law"; and that the petitioner is the "owner of about sixty-two acres of vacant land on the westerly side of Veterans of Foreign Wars Parkway in the Town of Dedham, title to which it acquired in 1947, and generally described as being bounded on the north by the line separating the Town of Dedham and the City of Boston, on the west by the Charles River, on the south by Mother Brook and on the east by the said Parkway, and more particularly shown on a plan entitled 'Plan of Land in Dedham, Mass.', Pilling Engineering Company, Inc., dated April 12, 1965." (See Exhibits No. 3 and 26.)

A stenographer was appointed to record the testimony. A view of the land here involved (hereinafter referred to as the locus) and of the surrounding area was taken in the presence of counsel.

The Town of Dedham at the annual Town Meeting in 1963, under Article 34 of the Town Warrant, voted to amend its zoning by-law and the zoning map by inserting a new zoning district which was to be known as the "Flood Plain District" (Exhibit No. 6) the pertinent portion of which provides as follows:

That the Town amend the Zoning By-law as follows:

> Under Section I. Establishment of Districts, I – 1. Types of Districts, that the following District be added, "9. Flood Plain District," and that the Zoning Map of said Town be amended by the addition of

the Flood Plain Districts shown on a plan by Pilling Engineering Company and dated December 7, 1962.

That after Section II–7, Industrial District Uses and before Section III, Accessory Uses, the following be inserted as Section II–8 "Flood Plain District" Uses:

The purpose of the Flood Plain District is to preserve and maintain the ground water table; to protect the public health and safety, persons and property against the hazards of flood water inundation; for the protection of the community against the costs which may be incurred when unsuitable development occurs in swamps, marshes, along water courses, or in areas subject to floods; and to conserve natural conditions, wild life, and open spaces for the education, recreation and general welfare of the public.

Within a Flood Plain District no structure or building shall be erected, altered or used, and no premises shall be used except for one or more of the following uses: Any woodland, grassland, wetland, agricultural, horticultural, or recreational use of land or water not requiring filling. Buildings and sheds accessory to any of the Flood Plain uses are permitted on approval of the Board of Appeals. Notice of each such Flood Plain building permit application shall be given to the Town Public Works Department, to the Town Board of Health, to the Town Planning Board, and to the Town Conservation Commission as well as all other parties required.

The Board of Appeals, in hearing such application, shall consider, in addition to any other factors said Board deems pertinent, the following aspects with respect to flooding and Flood Plain District zoning provisions: that any such building or structure shall be designed, placed, and constructed to offer a mini-

mum obstruction to the flow of water; and that it shall be firmly anchored to prevent floating away.

If any land in the Flood Plain district is proven to the satisfaction of the Board of Appeals after the question has been referred to the Planning Board, the Board of Health, and the Board of Selectmen, and reported on by all three boards or the lapse of thirty days from the date of referral without a report, as being in fact not subject to flooding or not unsuitable because of drainage conditions for any use which would otherwise be permitted if such land were not, by operation of this section, in the Flood Plain district, and that the use of such land for any such use will not interfere with the general purposes for which Flood Plain districts have been established, and will not be detrimental to the public health, safety, or welfare, the Board of Appeals may, after a public hearing with due notice, issue a permit for any such use.

Except as provided above, there shall be in the Flood Plain District:

No land fill or dumping in any part of the District.

No drainage other than Flood Control works by an authorized public agency.

No damming or relocation of any water course except as part of an over-all drainage basin plan.

No building or structure.

No permanent storage of materials or equipment.

In any Flood Plain District after the adoption of this provision, no land, building, or structure shall be used for sustained human occupancy except dwellings theretofore lawfully existing, or land, buildings or structures which comply with the provisions of this by-law.

The areas sought to be placed in "Flood Plain District" at this time, are described (generally) as follows:

A. The low lands bordering the Charles River, as shown on the map prepared by Pilling Engineering Co., entitled "Proposed Flood Plain District" and dated 12/7/62, and designated as Area #1....

The section of the foregoing by-law shown as paragraph "A" purports to include the locus which has been designated "Area #1." Article 34 of the amended by-law describes the locus as consisting of "low lands bordering the Charles River, as shown on the map prepared by Pilling Engineering Co., entitled 'Proposed Flood Plain District' and dated 12/7/62, and designated as Area #1."

Paul E. Taylor, an appraiser, testifying for the respondent, bounded the petitioner's property as starting at the northerly point on the Boston line, running southerly along the Veterans of Foreign Wars Parkway (Route 1) where there is about an 1850 foot frontage of what he referred to as "hard" or "high" ground. The "hard" or "high" ground contains about 6.3 acres, he stated, which is located at the top left part of Exhibit No. 48, as it abuts Route 1. "About 400 feet back from Route 1," there is another area of "hard" ground which he referred to as an island, containing 3.2 acres, located "fairly near the Charles River," at about the middle of Exhibit No. 48; that there is a knoll of .2 acres located in the middle left foreground near the Charles River as shown on the aforementioned Exhibit No. 48. The remaining area "is a low, swampy area, running to the Charles River from the higher elevations" containing, he stated, approximately 60 acres. He has estimated that 53 acres would be in the lowland area. The total area of the petitioner's land being 61.94 acres. Of this total, 6.3 acres, 3.2 acres and .2 acres are "hard" or "high" ground, he stated.

Out of about 61.9 acres of land owned by the petitioner, approximately 53.2 acres is shown in color on the Flood Plain District Map as displayed at the meeting of the

Town members at the time of the adoption of the new flood plain district by-law (Exhibit No. 6) and map (Exhibit No. 3).

An engineer with the Pilling Engineering Company and employed by the Town of Dedham, John Tulloch, was asked by the Conservation Commission of the Town of Dedham to make a zoning map for the Town as it related to Flood Plain Districts. He testified that he colored certain areas in green as shown on the Preliminary Proposed Flood Plain District map, Exhibit No. 26, and on the map shown at the meeting of the Town Members, in which two knolls on the locus in excess of an elevation of 98 feet were included.[1] This was done notwithstanding part of the legend of the maps (Exhibits No. 3 and No. 26) which read "All Elevations Taken to Elevation 98 Dedham Base."

The by-law, he said, included all of the areas colored on the Flood Plain District Map entitled "Town of Dedham —Mass Flood Plain District Dec. 7, 1962 Pilling Engineering Company, Inc., Dedham, Mass." (Exhibit No. 3) which included the locus.

Notwithstanding the respondent's admission in its answer, some confusion as to what comprises the locus has resulted in view of the inclusion of the two "knolls" which rise above the 98 foot elevation in the Flood Plain District Zoning Map (Exhibit No. 3) and from the use of the word "lowlands" in the by-law, (Paragraph A in Exhibit No. 6) and the respondent's apparent contention that by definition 98 feet is not lowland and that the 3.2 and .2 acre "knolls" or "uplands," therefore, do not come under the provisions of the Flood Plain District by-law.

Prior to the adoption of the Flood Plain District zoning, the subject area was zoned in a General Residence District (Exhibit No. 5). The new by-law superimposed a flood plain

[1] The witness testified that 98 feet was "merely an elevation above the elevation of the swamp in that area."

district upon the underlying general residence district. This type of action has been described as "an anomalous by-law provision for double zoning." Noonan v. Moulton, 348 Mass. 633; footnote page 636.

Both of these areas are isolated and can only be reached by the construction of a road or bridge from the public way (Route 1). However, the Town Meeting voted for the flood plain district zoning upon the basis of an enlarged reproduction of the Flood Plain District Zoning Map (Exhibit No. 3) which included these areas. Its inclusion may have been inadvertent and the respondent appears to be of the present opinion that these two areas are not or should not have been included in the Flood Plain District Zoning Map (Exhibit No. 3).

In either circumstance, it is evident that the petitioner would not have been able to utilize these areas for the purposes authorized under the underlying zone (General Residence) without obtaining a special permit from the Board of Appeals for access to it over the surrounding flood plain district zone.

The Court finds and rules that the 3.2 and .2 acre knolls were included in the Flood Plain District Zone which was adopted by the Town of Dedham.

SEASONAL OR PERIODIC FLOODING.

The petitioner argues that there has been no flooding seasonally or periodically over the petitioner's land for many years prior to and since the general area of the petitioner's land came under the jurisdiction of the Metropolitan District Commission and is not now and was not subject to seasonal or periodic flooding at the time of the adoption of the new zoning by-law; that there should have been an appropriate determination as to such flooding as a prerequisite to any action, and that, assuming the by-law is valid on its face, the petitioner's land does not fall within the category of lands "seasonally or periodically" flooded.

The petitioner further contends that the land has "been the object of artificial flooding" by the opening and closing of the Metropolitan District Commission bascule gate at Mother Brook, which controls the height of the Charles River in the immediate vicinity of the petitioner's land, brought about by the allegedly inept control of the gate by the person responsible for its operation.

Because the petitioner's land is subject to "chronic floods," the respondent argues, it is a proper area for the exercise of the municipal and legislative powers; that an express determination that the land in question is subject to flooding is not a prerequisite to the enactment of the by-law, since the statute requires only a reasonable basis for the judgment of the town meeting that the land is subject to flooding; that General Laws, Chapter 40A, Section 2 does not say that the lands must, in fact, be subject to flooding to be included in a flood plain district, rather it says that lands "deemed subject to seasonal or periodic flooding" may be included in such a district; that the words "seasonal or periodic" includes recurrent though irregular flooding since floods do not occur at "fixed and regular" intervals, but intermittently. At any rate, the respondent says, a finding that the petitioner's land is subject to "seasonal or periodic" flooding is required where, as here, the evidence shows that the land is frequently covered with water and that the Charles River is frequently above the height of the respondent's land, and that although the dam at Mother Brook is designed to control flooding, it cannot prevent it.

There was extensive evidence on elevation, topography, dams, flood control, flood gates all bearing on the issue whether or not the locus was subject to "seasonal" or "periodic" flooding, this included photographs, exhibits reflecting the elevation of the locus in relation to the Charles River (See Exhibit No. 48), as well as evidence concerning the level of the Charles River from 1954 to 1967 (See Exhibit

No. 49). The evidence indicated that there was a reasonable basis for the judgment of the town meeting that the land to be included in the "Flood Plain District" is, in fact, subject to seasonal or periodic flooding and that the determination of the Town Meeting that the locus was subject to flooding was not unreasonable or capricious.

A view of the locus further supported this testimony and disclosed that most of the locus consisted of lowlands covered with marshgrass and scrub growth. The only apparent areas on "high" ground within the locus consisted of the 3.2 acre and .2 acre knolls.[2]

The town is presumed to have acted rationally and reasonably in enacting the by-law creating the "Flood Plain District"; hence, an express and factual determination that the land is subject to flooding is not required here.

I find and rule, on all of the evidence (including the view), that the Town Meeting held by the Town of Dedham on March 12, 1963 acted reasonably when, in the words of the Enabling Act, it impliedly "deemed" the locus to be subject to "seasonal" or "periodic" flooding. (See Lanner v. Board of Appeals of Tewksbury, 348 Mass. 220, 228; Caires v. Building Commissioner of Hingham, 323 Mass. 589, 594-595.)

SPOT ZONING

The petitioner alleges that the singling out of the petitioner's property as the only parcel on either side of the Veterans of Foreign Wars Parkway (U.S. Route #1) for miles that is not developed for commercial use is arbitrary and capricious and has asserted there is some evidence that there are large areas of marshland in the Town of Dedham which are below the 98 foot elevation (which elevation the respondent purportedly used in establishing the flood plain district). All areas in the Town below this elevation are not

[2] There was some evidence that the larger island or knoll consisting of about 3.2 acres had an elevation of about 121 feet and the smaller .2 acre knoll of about 100 feet and are not subject to flooding.

colored in the zoning map (See Exhibits No. 3 and No. 26). Whether the omission to include these areas would so violate the zoning principle of uniformity as to constitute spot zoning, in the absence of evidence of the particular characteristics of every swamp in town, is not herein decided. (General Laws, Chapter 40A, Section 2). There was insufficient evidence to allow the Court to make such a determination.

LAND VALUE

Torsten Reenstierna, a real estate appraiser with forty years experience, testified that he was engaged by the petitioner to determine the fair market value of its property; that prior to March 12, 1963, the time of the new Flood Plain District Zoning by-law, in his opinion, the highest and best use of the land was for the building of apartment houses and that, after that date, its highest and best use "would be for agricultural purposes." He stated that it is his opinion that the fair market value before the enactment of the Flood Plain District by-law was $605,000; and that the fair market value after such enactment was $227,000. This, he stated, included an area of 8.7 acres still available for development which was not part of the locus.[3] On the basis of his testimony, it would appear that without the "8.7" acres the value of the locus, prior to the enactment of the subject by-law, was $431,000 and $53,000 after said enactment.

The petitioner maintains "... that a finding is warranted that there has been a substantial diminution in value of [its] land by reason of its inclusion in the flood plain district." It also sought to establish that its land "can be useable and put to practical use and be constructed upon" and that land similar in character has been used by the respondent to build housing for the elderly.

The respondent's witness testified that the value of the

[3] The respondent's witness testified that this area consists of 6.3 acres along the Veterans of the Foreign Wars Parkway (Route 1).

lowlands was not affected by the Flood Plain District as the nature of the terrain was such as to make construction of housing on the locus under the General Residence Zone not economically feasible.

The respondent argues that the issue is not whether the imposition of the by-law brought about a diminution in value of the respondent's property, but whether the by-law under consideration constitutes a proper exercise of the police power in furtherance of the general welfare rather than an unconstitutional taking of the respondent's land; that in view of the fact that the respondent's land was not rendered valueless by the zoning, no principle of constitutional law requires the court to abrogate the express will of the town as found in its flood plain zoning; that even a very great decrease in the value of the respondent's property would not be conclusive and that, in any case, the petitioner has not produced substantial evidence that the land has been rendered valueless or nearly valueless.

The petitioner cannot argue that it has been deprived of all use of its property, the respondent insists, until it has exhausted its remedy by applying for a special permit under paragraph 4 of the by-law and been denied such a permit.

The fact that some hardship is experienced or that it may be more profitable to make other use of the property is not controlling in determining whether the regulations are arbitrary or unreasonable, and the highest, best use of the property involved is but one factor to be considered. *Howland* v. *Cambridge,* 102 N.E. 2d 423, 328 Mass. 155; *Medford* v. *C & H Co.* 65 N.E. 2d 537, 319 Mass. 273; *Simon* v. *Needham,* 42 N.E. 2d 516, 311 Mass. 560.

Zoning regulations must meet the demands of the constitutional prohibition against the taking of private property for public use without just compensation. Where a regulation permanently so restricts the use of property that it cannot be used for any reasonable purpose, it would come

within the constitutional inhibition as being arbitrary or unreasonable or lacking in any substantial relation to the public health, safety, morals or general welfare. But this is, however, qualified by the police power, and reasonable restrictions, bearing a substantial relation to the public health, safety, morals or general welfare, imposed in the exercise of the police power, do not fall within the constitutional ban. *Slack & another* v. *Inspector of Buildings of Wellesley,* 262 Mass. 404.

It must be noted that the petitioner has introduced evidence tending to show that the locus was not completely valueless and that use of the land for agricultural purposes was its best use after the adoption of the Flood Plain District Zoning. The petitioner, therefore, was not completely deprived of all use of its property. Although there was a substantial diminution in value of the locus, the mere decrease in the value of a particular piece of land is not conclusive evidence of an unconstitutional deprivation of property. *Anderson* v. *Wilmington,* 347 Mass. 302, 304; *Massachusetts Broken Stone Co.* v. *Weston,* 346 Mass. 657, 661; *Caires* v. *Building Commissioner of Hingham,* 323 Mass. 589, 594.

SPECIAL PERMIT

The object of the by-law adopted at the request of the Town Conservation Commission, the petitioner avers, was "to keep the petitioner's land in its natural state for the benefit of the public constituting a permanent restriction against the profitable development" or beneficial use "thereof by the petitioner in contravention of Part the First, Article I and X of the Constitution of the Commonwealth of Massachusetts and Amendment 14th of the Constitution of the United States of America because it deprives the petitioner of its property without due process of law and denies the petitioner the equal protection of the law."

The authority to issue permits for the erection of struc-

tures on the petitioner's land, it states, is made subject to the approval of the Planning Board, Board of Health and Board of Selectmen and exceeds the authority granted by General Laws, Chapter 40A, Section 4 and 15; "that no provision is made (therein) for a period of appeal to the Board of Appeals by any person aggrieved by the decision of the administrative officer or officers of the Town relating to a proposed use, otherwise permitted, of your petitioner's land, as provided in Section 13 of General Laws, Chapter 40A"; and that, further, "the authority of the Board of Appeals to issue a permit for any use otherwise permitted, if such land were not by the operation of said zoning by-law in the Flood Plain District, is a nullity and without force of law for the reason that any exception allowable, as provided by Section 4 of 40A of the General Laws, could not be in harmony with the general purpose and intent of said zoning by-law the main object of which is completely to restrict the development of [the] petitioner's land in any manner and conserve natural conditions, wild life, and open spaces for education, recreation and general welfare of the public."

In enacting General Laws, Chapter 40A, Section 2 (the Enabling Act), the petitioner contends, it was not the legislative intent to prohibit the erection of structures on Flood Plain District land, but to adopt "... reasonable regulations to protect the occupants of such structures ..." and that the land not be used in such manner as to endanger the health and safety of the occupants of any structure thereon and not to protect occupants of other land in the area, and that its purpose is not to prohibit the use of the land but to impose reasonable restrictions as shall not deny the owner its constitutional right to improve and use the land profitably or reasonably without impairing health, safety and welfare of the community. *Commissioner of Natural Resources* v. *S. Volpe & Co. Inc.* 349 Mass. 104.

While the provisions of the Enabling Act (General Laws, Chapter 40A, Section 2) authorize the enactment of regulations which protect the "health and safety of the occupants" of land "deemed" to be subject to "seasonable and periodic" flooding, the petitioner asserts that this by-law, based on a planning board report (Exhibit No. 47), has for its purpose the protection of occupants of other zones. This, the petitioner says, is beyond the scope of the Enabling Act.

It is the petitioner's contention that the provision in the by-law (paragraph 4) requiring one seeking a special permit to prove to the satisfaction of the Board of Appeals that the land is not subject to flooding, unsuitable for drainage, and will not be detrimental to the public safety, etc., is vague and capricious inasmuch as it establishes no standards by which the "satisfaction" of the Board can be measured.

The respondent contends that the Flood Plain District is merely "superimposed on existing zoning, which means that if the restrictions are not applicable because the land is not subject to flooding, then the restrictions imposed by the underlying zone would apply" under which circumstance, if a permit were granted, it would clearly be "in harmony with the general purpose and intent of the by-law" (General Laws, Chapter 40A, Section 4) because that purpose is to protect land which is actually subject to flooding.

The respondent asserts that the by-law clearly sets forth the provisions excepting from its operation land not subject to flooding or otherwise suitable for ordinary use; that there is, therefore, no basis for the petitioner's argument that a special permit under paragraph 4 of the by-law will not be so interpreted as to allow the petitioner to use the land for the purposes permitted in an underlying zone; that a special permit could be granted under paragraph 4 of the by-law; and that the validity of the by-law cannot be attacked on the basis of the fact that any special permit would be subject to appeal (General Laws, Chapter 40A, Section

21) or other type of review, because these remedies apply to every zoning by-law.

The respondent further insists that the phrase "to the satisfaction of the Board of Appeals" in paragraph 4 of the by-law is not so vague as to render it unconstitutional, since the ultimate decision of the Board must be based on substantial evidence supporting the claim that the land is not subject to flooding, or is suitable, because of the drainage conditions, for a proposed use.

The respondent alleges that aesthetic considerations, alone, do not justify the enactment of restrictive zoning regulations, but may be considered "as one of the purposes of a zoning by-law" where, as in the instant case, the other purposes "are fully adequate to support the validity of the by-law," and that evidence tending to indicate that the enactment of the by-law was motivated by a desire to keep the land in its natural state for conservation purposes was irrelevant in determining the validity of the by-law.

The respondent argues that the Dedham by-law rests not only on the statutory authority of General Laws, Chapter 40A, Section 2, but also upon the broader authority to zone for general welfare, and that the first three purposes recited in the by-law are related to public health, safety and welfare of the inhabitants of the town and the petitioner has not sustained his burden of showing that the by-law conflicts with the Enabling Act (General Laws, Chapter 40A, Section 2) or "with applicable constitutional provisions."

Where the reasonableness of a zoning ordinance is fairly debatable, it must be upheld. *Raymond* v. *Lowell,* 131 N.E. 2d 189, 333 Mass. 410; *Caires* v. *Hingham,* 83 N.E. 2d 550, 323 Mass. 589.

The fact that certain zoning action is urged by a minority, majority, or by all of the community neither brings the action within the police power nor prevents it from being

valid and constitutional. *Caires* v. *Building Commissioner of Hingham, supra; Simon* v. *Needham, supra.* The fact that the exercise of the zoning power reduces the value of some individual rights does not render it invalid if the restriction is for the greater benefit accruing to the public as a whole. *Caires* v. *Building Commissioner of Hingham, supra.* Section 4 of the Zoning Enabling Act (General Laws, Chapter 40A) expressly permits zoning ordinances or by-laws to provide for exceptions thereto; and it also expressly permits the delegation of authority to the Board of Appeals to issue special permits for such exceptions.

The by-law has two special permit procedures. One special permit provision relates to buildings and sheds accessory to agricultural uses, and provides that the Board of Appeals, in addition to other factors shall give regard to minimum obstruction of water and anchoring of buildings. The other special permit proceeding relates to land which is proven "to the satisfaction of the Board of Appeals after the question has been referred to the Planning Board and Board of Health, and the Board of Selectmen as being in fact not subject to flooding, or not unsuitable because of drainage conditions" for any underlying permitted use. After stating the provisions relating to these two special permit procedures, the by-law says that except as provided, there shall be in the Flood Plain District no land fill.

The decision of whether to grant or deny a special permit cannot be left "to the 'untrammeled discretion' or 'unbridled fiat' of the board" and "the Zoning Enabling Act and by-law together must provide adequate standards for the guidance of the board in deciding whether to grant or to withhold special permits for the excavation or filling of wetlands." *MacGibbon* v. *Board of Appeals* (and cases cited therein) *of Duxbury,* 1970 Advance Sheets 81, 83; *Building Commissioner of Medford* v. *C & H Co.* 319 Mass. 281; *Commonwealth* v. *Protami,* 354 Mass. 210, 211.

Such standards as exist are to be found in General Laws, Chapter 40A, Section 4[4] as well as in the amended by-law which provides that a permit may issue "for any use which would otherwise be permitted if such land were not, by operation of this section, in the Flood Plain District, and that the use of such land for any such use will not interfere with the general purposes for which the Flood Plain Districts have been established and will not be detrimental to the public health, safety, or welfare."

In applying the standards provided by the Enabling Act and the by-law, the Board of Appeals must act fairly and reasonably, always keeping in mind the purposes and objectives of the Enabling Act and the by-law and it cannot now be assumed that the board would not comply with this requirement.

The Court notes that there is no provision in the by-law for a special permit for access over the lowlands to the knolls on the locus and that the notice requirements on special permit petitions are more onerous than those required under the Zoning Enabling Statute, General Laws, Chapter 40A, Section 4. Notwithstanding and having in mind the statutory procedures relating to the granting of variances under Chapter 40A, Section 15, this Court cannot assume that the town will exercise these powers in such a way as unconstitutionally to deprive the petitioner of his property.

There are provisions in this by-law which raise some difficult questions as to special permit (exceptions) procedures and standards. The most significant are:

1. The preamble of the by-law sets out purposes which go

[4] This section also provides for exceptions to the regulations and restrictions in a given by-law which are to be "applicable to all of the districts of a particular class and of a particular character," but requires that the exceptions be "in harmony with the general purpose and intent of the ordinance or by-law. . . ."

far beyond the purposes for so-called flood plain zoning as set out in the Zoning Enabling Act.

2. The provisions for notice go beyond General Laws, Chapter 40A, Section 17.

3. There is a subjective standard of proof, i.e., "to the satisfaction of the board."

4. The provisions as to land fill are vague.

5. There is no provision for land fill for access to the upland areas.

On its face, the by-law would seem to be vulnerable to the petitioner's attack on the ground that it is illusory. However, in this kind of proceeding, the Court cannot prospectively assume that the Board of Appeals will not guide itself by the Zoning Enabling Act as well as the by-law, and that it will not make a sagacious distinction between the grandiose purposes set out in the by-law and the more mundane purposes of the Enabling Act. The Board has the duty of reading both together. *MacGibbon* v. *Board of Appeals of Duxbury, supra.*

Having in mind the foregoing, and the Board of Appeals' statutory variance powers in cases of hardship, the Court cannot now rule that the standards and procedures for exceptions are invalid.

The construction of a zoning ordinance or by-law under the facts is to be made in order to ascertain its meaning and give effect to the intention of the lawmaking body. A zoning ordinance must be construed as a whole, and in such manner as to reconcile and give effect to all its provisions; no part of the ordinance or by-law is to be eliminated unless it is plainly and clearly ambiguous, or redundant, or contradictory, or impossible of application.

Questions of wisdom, expediency, and policy will not be considered by the Court in passing on the validity of building and zoning by-laws, ordinances or regulations. The fact that the wisdom of the zoning ordinance provision is debatable does not impower a Court to substitute its judg-

ment for that of the legislative body. *Burnham* v. *Board of Appeals of Gloucester*, 333 Mass. 114, 117.

The power to regulate the use of property must not be exercised arbitrarily, but such powers, with respect to the enactment of zoning ordinances and regulations, must be exercised reasonably. *Pittsfield* v. *Oleksak*, 313 Mass. 553.

The words of a zoning ordinance ordinarily will be construed according to their natural import in common and approved usage (*Foster* v. *Beverly*, 315 Mass. 567, 569) and the courts will not give a strained meaning to words of the ordinance in order to effectuate its purpose. *Westchester* v. *Mengal*, 54 N.E. 2nd 329; 292 N.Y. 121.

Whenever the language of a zoning statute or ordinance is susceptible of more than one reasonable interpretation, that interpretation will be adopted which will best carry out its evident purpose. That construction of a zoning regulation is to be adopted which will avoid conflict with the Constitution.

Within the Flood Plain District the uses permitted by the by-law in question are: "woodland, grassland, wetland, agriculture, horticultural, or recreational use of land or water not requiring filling." In view of the location of the petitioner's land, its proximity to a major highway as well as to commercially developed property, and the fact that a major portion of the area consists of wetlands covered with marsh grass and scrub vegetation (with the exception of certain areas above the flood level heretofore mentioned) it has not been established that the petitioner's land could not have been put to any practical use upon applying for and obtaining a special permit as provided in the Flood Plain District by-law. Although there are areas which are high and dry islands in the locus, as before mentioned, which can be reached only by the construction of a bridge or roadway, no effort has been made by the petitioner to obtain such special permit or variance as may be necessary to accomplish this purpose.

The petitioner bears the burden of establishing the in-

validity of the Flood Plain District Zoning by-law approved by the Town of Dedham. "One assailing a statute on constitutional grounds has the burden of proving the absence of any conceivable grounds upon which the statute may be supported." *Merit Oil Co.* v. *Director of the Division on the Necessaries of Life*, 319 Mass. 301, 305. *Commonwealth* v. *Chamberlain*, 343 Mass. 49, 51-52. The decision as to what measures are necessary for the preservation of life, health, and morals is in the first place a matter for the legislative authority, and every presumption must be made in favor of the validity of statutes enacted to further those objectives. *Paquette* v. *Fall River*, 338 Mass. 368, 376. If the question is fairly debatable, courts cannot substitute their judgment for that of the Legislature." *Druzik* v. *Board of Health of Haverhill*, 324 Mass. 129, 139; *Hall-Omar Baking Co.* v. *Commissioner of Labor & Industries*, 344 Mass. 695, 700; *Mile Road Corp.* v. *Boston*, 345 Mass. 379.

"The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power or authority delegated to municipalities under the Zoning Enabling Act." *MacGibbon* v. *Board of Appeals*, 1970 Advance Sheets, 81, 86; *Aronson* v. *Sharon*, 346 Mass. 598, 603-604.

The purposes and operation of the by-law and the purposes and operation of the statutes providing for conservation are somewhat different. The former, as has been noted previously, is aimed at the regulation of the use of land for the benefit of the occupants thereof, but in such a way that the entire community is benefited thereby, whereas the latter is aimed at preserving the land in its natural state. Although a town may consider preserving the natural beauty of a neighborhood as one of the purposes of an otherwise valid zoning by-law which it enacts, such preservation of natural beauty cannot be the sole purpose of the by-law. *Barney & Carey Co.* v. *Milton*, 324 Mass. 440, 448.

General Laws, Chapter 40A, Section 2 does not authorize a comprehensive conservation zoning by-law. The statement contained therein that "... a zoning ordinance or by-law may provide that lands deemed subject to seasonal or periodic flooding shall not be used for residence or other purposes in such a manner as to endanger the health or safety of the occupants thereof" is clearly not a blanket provision authorizing extensive and highly restrictive zoning for the benefit of the entire community.

This is not to say that the town is prevented from preserving its remaining, undeveloped wetlands in their natural state for the enjoyment and benefit of the public. There are alternatives available by which a town may accomplish this altogether laudable objective. It may, for example, acquire the wetlands by eminent domain under General Laws, Chapter 79 or Chapter 80A, or it could conceivably acquire an easement therein. See *MacGibbon* v. *Board of Appeals* (*supra*) and cases cited therein (for specific examples of the alternatives available to the town see footnote 3 page 87 of the *MacGibbon* case, *supra*).

It is to be noted that the only structures permitted under the by-law are "Buildings or shed accessory" to the uses set forth therein and "no land, building, or structure shall be used for sustained human occupancy." This language is employed in spite of the fact that the Enabling Act specifically states that "A Zoning ordinance or by-law may provide that lands deemed subject to seasonal or periodic flooding shall not be used for residence or other purposes in such a manner as to endanger the health or safety of the occupants thereof." The language of the statute is preventive in contrast to the prohibitive language of the by-law. The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any

power or authority delegated to municipalities under the Zoning Enabling Act. *Aronson* v. *Sharon*, 346 Mass. 598, 603-604.

"Every presumption is to be made in favor of the validity of a zoning by-law and great weight is to be given to the town's determination that necessity exists for its adoption or amendment." *Jenckes* v. *Building Commissioner of Brookline*, 341 Mass. 162, 166 and cases cited therein.

The Court rules and determines that the zoning by-law enacted by the Town of Dedham at its annual town meeting in 1963 as described in Article 34 (Exhibit No. 6) and as indicated in the zoning map (Exhibit No. 3) and approved by the Attorney General on July 15, 1963 was a valid exercise of the authority and powers conferred upon the respondent Inhabitants of the Town of Dedham by General Laws, Chapter 40A and is in full force and effect as to the petitioner's land.

The petitioner filed 55 requests for rulings. I allow requests Nos. 1, 2, 3, 4, 5, 6, 13, 23, 24, 28, 45, 46, and 47. Requests Nos. 12, 16, and 17 are denied because they are contrary to the facts found. Request No. 9 is for a finding of fact. Requests for rulings Nos. 7, 8, 10, 11, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 48, 49, 50, 51, 52, 53, 54, and 55 are denied.

The respondent filed 17 requests for rulings. Request No. 14 is for a finding of fact. Request No. 15 is denied as being immaterial and irrelevant. Request No. 16 is denied. The remainder of the requests for rulings are allowed.

All exhibits and chalks introduced in evidence are incorporated herein for the purpose of any appeal.

Decree accordingly.

JOSEPH B. SILVERIO,
Associate Judge.

Dated September 1, 1970.

## APPENDIX C
### Petitioner's Request For Rulings Filed in the Land Court

1. This petition is properly before this Court.
2. This petition is not prematurely brought.
3. When a full scale attack is made on a zoning by-law it is not necessary to exhaust administrative remedies provided within it.
4. This petition is in the nature of a proceeding for declaratory judgment, and, therefore, it was not necessary to exhaust one's remedies within the zoning by-law before bringing this petition.
5. It is not necessary that the petitioner first seek the permit purportedly provided for within the provisions of the zoning by-law and have the same denied before bringing this petition.
6. This petition is properly before this Court and is authorized by the provisions of the General Laws of Massachusetts, Chapter 240, section 14-A.
7. The word "flooding" in the enabling statute (Chapter 40A, section 2, last sentence) means flooding from natural causes.
8. If any flooding of the petitioner's land was caused by artificial means, the inclusion of said land in a Flood Plain district was arbitrary and unreasonable and, therefore, invalid, void and of no effect.
9. Upon all the evidence a finding is warranted that the land of the petitioner has not been seasonally or periodically flooded from natural causes within the meaning of the enabling statute since the installation of the bascule gate at Mother Brook.
10. Any flooding of the petitioner's land which occurred prior to the installation of the bascule gate at Mother Brook is no longer relevant to the determination of the issue of flooding of said land by natural causes.

11. The enabling statute does not authorize the inclusion of lands in a Flood Plain district which are not subject to seasonal or periodic flooding from natural causes.

12. The occurrence of flooding from natural causes once in a period of years is not seasonal or periodic flooding within the meaning of the enabling statute.

13. "Seasonal" within the context of the enabling statute means (floods) recurring at the same season in each year.

14. "Periodic" within the context of the enabling statute means (floods) recurring at regular and fixed intervals.

15. In order for lands to come within the sweep of the enabling statute, such lands must be subject to flooding from natural causes which occur regularly from season to season or at fixed intervals.

16. An occasional flood from natural causes, of the nature of the flood which occurred in March, 1968, is not the type of "seasonal" or "periodic" flooding intended within the meaning of the enabling statute.

17. The occurrence of natural floods affecting the petitioner's land over the many years at irregular intervals gives no authority under General Laws, Chapter 40A, section 2, to subject the petitioner's land to the zoning by-law nor to include it in a "Flood Plain district".

18. There is no evidence that the land of the petitioner was subject to seasonal or periodic flooding from natural causes.

19. Upon all the evidence a finding is warranted that the land of the petitioner is not subject to seasonal or periodic flooding from natural causes.

20. Upon all the evidence a finding is warranted that since the date of the installation of the bascule gate at Mother Brook the land of the petitioner has not been subject to seasonal or periodic flooding from natural causes.

21. Upon all the evidence a finding is warranted that

since the installation of the bascule gate at Mother Brook, with the exception of the flooding of March, 1968, any flooding of the petitioner's land has been artificial and not the result of natural causes.

22. Upon all the evidence a finding is warranted that since the installation of the bascule gate at Mother Brook, with the exception of the flooding of March, 1968, any flooding of the petitioner's land has been caused by the overflow of the Charles River waters because of the failure of the M.D.C. to lower said gate.

23. The petitioner's land is subject to two zoning by-laws: The underlying General Residence zoning by-law (hereinafter called "underlying zone") and the superimposed Flood Plain district zoning by-law (hereinafter called "zoning by-law").

24. It was not the object of the legislature in granting to the Respondent the right to enact a zoning by-law regulating use of lands subject to seasonal or periodic flooding, so to restrict the uses permitted by the underlying zone as to prevent their development for such uses, but to add only such amendments thereto, by means of the new zoning by-law, as to provide for the protection of the health and safety of the occupants thereof against such flooding.

25. The zoning by-law imposes such onerous restrictions on the uses permitted by the underlying zone as to deny an owner the right to develop his land and is equivalent to a taking without just compensation, and, is void, invalid and unconstitutional.

26. Upon all the evidence a finding is warranted that the purpose of the zoning by-law is to limit the use of lands in a Flood Plain district to what is tantamount to open spaces, thereby annulling any underlying zone permitting the erection and maintenance of structures for human habitation.

27. The zoning by-law exceeds the authority granted to

the Respondent by the enabling statute and, therefore, is void, invalid and of no effect.

28. Any special permit which the Board of Appeals may issue under the exception of the zoning by-law must be for uses which "will not interfere with the general purposes for which Flood Plain districts have been established."

29. Any special permit which the Board of Appeals may issue under the exception of the zoning by-law for uses permitted by the underlying zone, namely, residences for sustained human habitation, would be invalid as not being in harmony with the general purposes for which Flood Plain districts have been established.

30. Any special permit which the Board of Appeals may issue under the exception of the zoning by-law for uses permitted by the underlying zone, namely, residences for sustained human habitation, would be invalid as not being in harmony with the general purposes for which Flood Plain districts have been established, and, therefore, the owner of land in such district could not lawfully develop it, depriving him of the use thereof without just compensation.

31. The Board of Appeals cannot properly grant a special permit for any use permitted by the underlying zone.

32. The filing of an application by the petitioner for a permit to use its land would be futile and an empty gesture because it would be legally impossible for the Board of Appeals to issue such permit in contravention of the purposes of the by-law, which are, in the conjunctive: to preserve and maintain ground water table, to protect health and safety of persons and property against the hazards of flood, to protect the Town against costs of development in swamps and areas subject to floods, to conserve natural conditions, wild life and open spaces for general welfare of the public.

33. The provision in the exception to the zoning by-law that before the special permit issue certain facts be proven to the "satisfaction" of the Board of Appeals, provides no standards by which the action of said Board may be reviewed and is therefore a violation of the Massachusetts and United States Constitutions, void and of no effect.

34. The word "satisfaction" in the exception of the zoning by-law is a vague and an imprecise term, and violates the first essential of due process of law, rendering said by-law unconstitutional, void and of no effect.

35. The said by-law is invalid because, even if the Board of Appeals has proven to its satisfaction the facts necessary for it to issue a permit, the words "may . . . issue a permit" imposes no obligation upon it to do so, and leaves the landowner at the mercy, whim or caprice of said Board, thereby denying the landowner due process of law.

36. There is evidence that the land of the petitioner was included in the "Flood Plain district", so-called, without any prior reasonable determination that said land was subject to seasonal or periodic floodings from natural causes.

37. Upon all the evidence a finding is warranted that the land of the petitioner was included in the "Flood Plain district", without a prior reasonable determination that said land was subject to seasonal or periodic flooding from natural causes.

38. In order for the inclusion of the petitioner's land within a "Flood Plain district", and any regulation, by-law or ordinance applicable thereto, to be valid, there must be a prior reasonable determination by the Respondent that such land was subject to seasonal or periodic flooding from natural causes.

39. There is evidence that the land of the petitioner was included in the "Flood Plain district", and made subject to said zoning by-law, arbitrarily and unreasonably.

40. Upon all the evidence a finding is warranted that the land of the petitioner was arbitrarily and unreasonably included by the Respondent in a "Flood Plain district" and made subject to said zoning by-law.

41. Upon all the evidence the inclusion of the land of the petitioner by the Respondent in a Flood Plain district, subject to regulations adopted by the Respondent applicable to such district, as promulgated by the Respondent, goes beyond the scope and authority of section 2, Chapter 40A of General Laws, and is void.

42. The provision in the zoning by-law that, if any land in the Flood Plain district is proven to the satisfaction of the Board of Appeals as being in fact not subject to flooding, and subject to further finding to its satisfaction, such Board may issue a permit for any use which will not interfere with the general purposes for which such districts have been established, is evidence that the inclusion of the petitioner's land within such district was arbitrary and unreasonable.

43. The provisions in said by-law for a permit to be granted by the Zoning Board of Appeals to use said land is a nullity and void in that it is beyond the scope and authority of sections 4 and 15 of Chapter 40A of the General Laws.

44. The zoning by-law on its face and in its entirety exceeds the authority granted in the enabling statute, and is, therefore, void, invalid and of no effect.

45. Upon all the evidence a finding is warranted that the petitioner's land had substantial value.

46. Upon all the evidence a finding is warranted that the petitioner's land had substantial value, and that as a result of its inclusion in a "Flood Plain district" and the imposition upon it of the zoning by-law, it became greatly reduced in value.

47. Upon all the evidence a finding is warranted that

the petitioner's land could have been reclaimed, developed and put to profitable and productive use, if it had not been included in the "Flood Plain district" and the zoning by-law applied to it.

48. Upon all the evidence a finding is warranted that the prime object of the zoning by-law was the retention of all lands included in a "Flood Plain district" in substantially their natural state for public purposes, without just compensation to the private owners affected thereby.

49. Upon all the evidence a finding is warranted that the prime object of the zoning by-law was the retention of the petitioner's land in substantially its natural state and as a floodwater detention basin for the benefit of the public, without just compensation to the private owners affected thereby.

50. The greatly restricted uses provided in said zoning by-law impose such limitations on the use of land within a "Flood Plain district" as to deny a landowner any reasonable or practical means of obtaining income or a return from his property, and is equivalent to a taking of his land, without just compensation.

51. The objects and purposes of said zoning by-laws as applied to the petitioner and the petitioner's land constitute a deprivation of any beneficial use whatever of said land, without just compensation, and said zoning by-law is invalid as being in contravention of Part the First, Articles I and X of the Constitution of the Commonwealth of Massachusetts, and Amendment 14th of the Constitution of the United States of America, because it deprives the petitioner of its property without due process of law and denies the petitioner the equal protection of the laws.

52. The application of said zoning by-law to the petitioner's land is arbitrary, capricious and unreasonable, and has no rational relationship to any of the objects or pur-

poses of zoning as mentioned in General Laws, Chapter 40A, and is ,therefore, void and invalid.

53. The zoning by-law is on its face and without reference to its particular application to the petitioner's land, void and of no effect in that it has no reasonable relation to the legitimate objects of the zoning power and is unreasonable, confiscatory and tantamount to a taking of property without payment of just compensation in violation of the Massachusetts and United States constitutions.

54. Said zoning by-law is void and invalid in that it is a device and scheme to keep the petitioner's land in its natural state for the benefit of the public constituting a permanent restriction against the profitable development thereof by the petitioner in contravention of Part the First, Articles I and X of the Constitution of the Commonwealth of Massachusetts and Amendment 14th of the Constitution of the United States of America because it deprives the petitioner of its property without due process of law and denies the petitioner the equal protection of the laws.

55. Said zoning by-law is so vague and ambiguous as to be void under Amendment 14th of the Constitution of the United States of America and Part the First, Article XII of the Constitution of Massachusetts.

By its attorney
ANTONINO F. IOVINO.

Filed June 12, 1969.

## APPENDIX D

### Petitioner's Outline Bill of Exceptions Filed in the Massachusetts Supreme Judicial Court

This is a petition, as amended, brought under the provisions of General Laws, Chapter 185, section 1 (j½) and Chapter 240, section 14A, both as amended, to determine the validity of the amendment to the zoning by-law of the respondent Town of Dedham as set forth in the petition and to interpret said by-law and the extent to which it affects the petitioner's use, enjoyment, improvement and development of its land; and praying for a declaration that said zoning by-law is invalid, void and unconstitutional as applied to the petitioner's land.

The Court, on September 1, 1970, made a ruling and determination that the zoning by-law enacted by the respondent Town was a valid exercise of the "authority and powers conferred upon the respondent Inhabitants of the Town of Dedham by General Laws, Chapter 40A and is in full force and effect as to the petitioner's land."

The petitioner, being aggrieved by the findings and rulings of the Land Court, claims exceptions to said findings and rulings and pursuant to Supreme Judicial Court rule 1:22 (2) sets forth below the exceptions which it proposes to prosecute together with a brief statement of the nature of each exception. Following each numbered exception set forth below the petitioner has designated portions of the testimony and the exhibits it deems necessary for each such exception.

The portions of the trial transcript and exhibits designated below are attached hereto and incorporated by reference.

EXCEPTIONS.

1. The petitioner took exception to the court's finding and ruling that "the 3.2 and .2 acre knolls were included in the Flood Plain District Zone which was adopted." (De-

cision Land Court, last paragraph of page 7) [Now page 34.]

The petitioner designates the following testimony and exhibits as necessary for this exception:

(a) Pet. Exhibit No. 3—certified copy of original zoning plan.

(b) Pet. Exhibit No. 26—preliminary flood plain district plan.

(c) Transcript (Trans.) Vol. 4, pages 222 to 226, through line 13, being testimony of John Tulloch, Town Engineer of Dedham, called by the Pet.

2. The petitioner took exception to the Court's finding and ruling that:

"The town is presumed to have acted rationally and reasonably in enacting the by-law creating the 'Flood Plain district', hence, an express and factual determination that the land is subject to flooding is not required here.

"I find and rule, on all the evidence (including the view), that the Town Meeting held by the Town of Dedham on March 12, 1963 acted reasonably when, in the words of the Enabling Act, it impliedly 'deemed' the locus to be subject to 'seasonal' or 'periodic' flooding." (page 10 of Decision, first and second paragraphs) [Now page 36.]

The petitioner designates the following exhibits and testimony as necessary for this exception:

(a) Pet. Exhibits Nos. 33A through 33J—minutes of meetings of Conservation Commission.

(b) Pet. Exhibit No. 34—pages 171 through 200—of proceedings of Dedham Town Meeting, of March 1963.

(c) Trans. Vol. 2—pages 206 through 210—Testimony of John W. Hibbard, (described as John W. Hubbard in Trans.), Member of Conservation Commission called by Pet.

(d) Trans. Vol. 4, pages 217 through 233—Testimony

of John Tulloch, Engineer of Town of Dedham, called by Pet.

3. The petitioner took exception to the court's denial of the petitioner's request No. 40 that:

"Upon all the evidence a finding is warranted that the land of the petitioner was arbitrarily and unreasonably included by the Respondent in a 'Flood Plain district' and made subject to said zoning by-law."

The petitioner designates the exhibits and testimony set forth in exception No. 2, as above, as necessary for this exception.

4. The petitioner took exception to the denial of its request for ruling No. 38:

"In order for the inclusion of the petitioner's land within a 'Flood Plain district', any regulation, by-law or ordinance applicable thereto, to be valid, there must be a prior reasonable determination by the Respondent that such land was subject to seasonal and periodic flooding from natural causes."

The petitioner designates the exhibits and testimony set forth under exception No. 2, as above, as necessary for this exception.

5. The petitioner took exception to the court's finding and ruling:

"I find and rule, on all the evidence (including the view), that the Town Meeting held by the Town of Dedham on March 12, 1963, acted reasonably when, in the words of the Enabling Act, it impliedly 'deemed' the locus to be subject to seasonal and periodic flooding." (page 10 Decision). [Now page 36.]

The petitioner designates the exhibits and testimony set forth under Exception No. 2 as necessary for this exception.

6. The petitioner took exception to ruling of the Court that: "The court cannot now rule that the standards and

procedures for exceptions are invalid"; (bottom of page 20 of Decision) [now page 44] and to the denial of the petitioner's request for ruling No. 43 that "The provision of said by-law for a permit to be granted by the Zoning Board of Appeals to use said land is a nullity and void in that it is beyond the scope and authority of sections 4 and 15 of Chapter 40A of the General Laws."

These two exceptions relate to the same question, and are presented as one exception.

The petitioner designates the exhibit No. 6 (Article 34) the zoning by-law in issue in this proceeding—as necessary for this exception.

7. The petitioner took exception to the finding and ruling of the court that "Although there are areas which are high and dry islands in the locus, as before mentioned, which can be reached only by the construction of a bridge or roadway, no effort has been made by the petitioner to obtain such special permit or variance, as may be necessary to accomplish this purpose." (middle of page 22 of Decision) [Now page 45.]

The petitioner designates as necessary for this exception, the allowance by the Land Court of the Petitioner's request for rulings, numbers 2 through 6:

*Request No. 2.* This petition is not prematurely brought.

*Request No. 3.* When a full scale attack is made on a zoning by-law it is not necessary to exhaust administrative remedies provided within it.

*Request No. 4.* This petition is in the nature of a proceeding for declaratory judgment, and, therefore, it is not necessary to exhaust one's remedies within the zoning by-law before bringing this petition.

*Request No. 5.* It is not necessary that the petitioner first seek the permit purportedly provided for within the provisions of the zoning by-law and have the same denied before bringing this petition.

*Request No. 6.* This petition is properly before this Court and is authorized by the provisions of the General laws of Massachusetts, Chapter 240, section 14-A.

Decision of Court (page 25) allowing foregoing requests. [Now page 47.]

8. The petitioner took exception to the court's denial of the petitioner's request for ruling No. 7 that:

"The word 'flooding' in the enabling statute (Chapter 40A, section 2, last sentence) means flooding from natural causes."

The petitioner does not designate any testimony or exhibits as necessary for this exception.

9. The petitioner took exception to the court's denial of the petitioner's request No. 11 that:

"The enabling statute does not authorize the inclusion of lands in a Flood Plain district which are not subject to seasonal or periodic flooding from natural causes."

The petitioner does not designate any testimony or exhibits as necessary for this exception.

10. The petitioner took exception to the denial of the petitioner's request for ruling No. 20 that:

"Upon all the evidence a finding is warranted that since the date of the installation of the bascule gate at Mother Brook the land of the petitioner has not been subject to seasonal or periodic flooding from natural causes."

The petitioner designates as necessary for this exception the following testimony and exhibits.

(a) Trans. Vol. 2—pages 182 through 191, Testimony of Allan C. Grieve, Jr., of the Metropolitan District Commission,—called by the Pet.

(b) Pet. Exhibits No. 21 through 25—Photographs showing Mother Brook Dam.

(c) Trans. Vol. 4—pages 234 through 283;—Vol. 5, page 296, beginning with line 9 through line 6 of page 296.

Testimony of Salvatore Tremontozzi—Keeper of the bascule gate at Mother Brook, called by the petitioner.

(d) Pet. Exhibit No. 27—photo of gauge marker at Mother Brook Dam.

(e) Pet. Exhibits Nos. 28 and 29—reports of climatological date of U. S. Department of Commerce.

(f) Pet. Exhibit No. 30—records of Metropolitan District Commission relating to bascule gate position at Mother Brook for the years 1961 through 1967.

(g) Testimony of Robert Barrows, Hydrologist, called by Respondent. Trans. Vol. 8, pages 67 through 80; Trans. Vol. 9, page 41, lines 7 to bottom of page, and page 58 lines 5 to 8.

11. The petitioner took exception to the Court's denial of the petitioner's request No. 49 that:

"Upon all the evidence a finding is warranted that the prime object of the zoning by-law was the retention of the petitioner's land in substantially its natural state and as a floodwater detention basin for the benefit of the public, without just compensation to the private owners effected thereby."

The petitioner designates as necessary for this exception the following testimony and exhibits:

(a) Pet. Exhibit No. 39—letter of Conservation Commission to Town Meeting members—(without date) received by them prior to meeting of March, 1963.

(b) Trans. Vol. 9, page 50 lines 4 through line 22 and pages 58, from line 5 through 63, line 10—testimony of Robert Barrows, Hydrologist, called by the Respondent, relating to water storage capacity of Petitioner's land.

(bb) Pet. Exhibit No. 1—Article 34 in copy of publication of Town Meeting warrant.

(c) Trans. Vol. 6—pages 409, beginning with line 8, to 416 through line 2. Testimony of Nicholas DeSalvo, Chairman of Conservation Commission.

(d) Pet. Exhibit No. 34—Pages 171 through 200 of proceedings of Dedham Town Meeting of March 1963.

(e) Pet. Exhibits Nos. 33A through 33J—Minutes of Meeting of Conservation Commission.

(f) Resp. Exhibit No. 47—Finance Committee report—page 49 thereof—relating to its recommendation concerning Article 34 (the zoning by-law).

(g) Trans. Vol. 5—pages 314 beginning with line 10 through page 332—Testimony of Francis W. O'Brien, Chairman, Board of Selectman—called by Pet.

(h) Pet. Exhibit No. 33—minutes of hearing before Board of Selectmen, on application of petitioner to fill land under provisions of Section 117C of Chapter 131 of General Laws (so-called Hatch Act).

(i) Resp. Exhibit No. 50 geodetic survey for storage of water.

12. The petitioner took exception of the court's denial of petitioner's request No. 54 that:

"Said zoning by-law is void and invalid in that it is a device and scheme to keep the petitioner's land in its natural state for the benefit of the public constituting a permanent restriction against the profitable development thereof by the petitioner in contravention of Part the First, Articles I and X of the Constitution of the Commonwealth of Massachusetts and Amendment 14th of the Constitution of the United States of America because it deprives the petitioner of its property without due process of law and denies the petitioner the equal protection of the laws."

The petitioner designates as necessary for this exception all the exhibits and testimony referred to in the prior exception No. 11, as being equally applicable to this exception.

13. The petitioner took exception to the Court's denial of the petitioner's request No. 25, that:

"The zoning by-law imposes such onerous restrictions on the uses premitted by the underlying zone as to deny an owner the right to develop his land and is equivalent to a taking without just compensation, and is void, invalid and unconstitutional."

The petitioner designates as necessary to this exception the following exhibits:

(a) Pet. Exhibit No. 5. Zoning laws of the Town of Dedham—Sections II-3.

(b) Resp. Exhibit No. 6—(article 34) Flood Plain district zoning by-law. (in issue)

14. The petitioner took exception to the court's denial of the petitioner's request No. 27, that:

"The zoning by-law exceeds the authority granted to the Respondent by the enabling statute and, therefore, is void, invalid and no effect."

The petitioner designates as necessary for this exception the following:

Resp. Exhibit No. 6, (article 34) The Flood Plain district zoning by-law (in issue).

All exhibits and testimony designated under exception No. 11, above.

15. The petitioner took exception to the court's denial of the petitioner's request No. 30 that:

"Any special permit which the Board may issue under the exception of the zoning by-law for uses permitted by the underlying zone, namely, residences for sustained human habitation, would be invalid as not being in harmony with the general purposes for which Flood Plain districts have been established, and, therefore, the owner of the land in such district could not lawfully develop it, depriving him of the use thereof without just compensation."

The petitioner designated as necessary for this exception the following:

Resp. Exhibit No. 5—zoning laws of the Town of Dedham, sections II-3.

Resp. Exhibit No. 6 (article 34) Flood Plain district zoning by-law (in issue).

16. The petitioner took exception to the court's denial of the petitioner's request No. 33 that:

"The provision in the exception to the zoning by-law that before the special permit issue certain facts be proven to the 'satisfaction' of the Board of Appeals, provides no standard by which the action of said Board may be reviewed and is therefore a violation of the Massachusetts and United States Constitutions, void and of no effect."

The petitioner designates as necessary for this exception the zoning by-law Resp. Exhibit No. 6.

17. The petitioner took exception to the court's denial of petitioner's request No. 34 that:

"The word 'satisfaction' in the exception of the zoning by-law is a vague and imprecise term, and violates the first essential of due process of law, rendering said by-law unconstitutional, void and of no effect."

The petitioner designates as necessary for this exception the zoning by-law in issue, Resp. Exhibit No. 6.

18. The petitioner took exception to the court's denial of the petitioner's request No. 44 that:

"The zoning by-law on its face and in its entirety exceeds the authority granted in the enabling statute, and is, therefore, void, invalid and of no effect."

The petitioner designates as necessary for this exception the zoning by-law (in issue) Exhibit No. 6.

19. The petitioner took an exception to the court's denial of petitioner's request No. 52 that:

"The application of said zoning by-law to the petitioner's land is arbitrary, capricious and unreasonable, and has no rational relationship to any of the objects or pur-

poses of zoning as mentioned in General Laws, Chapter 40A, and is, therefore, void and invalid."

The petitioner designates as necessary for this exception the following:

Resp. Exhibit No. 6—the zoning by-law in issue.

Resp. Exhibit No. 5—the zoning by-law of the Town of Dedham, Sections II-3.

All the exhibits and testimony referred to in paragraphs (a) (b) (c) (d) (e) (f) (g) (h) (i) of exception No. 11, above.

20. The petitioner took an exception to the court's denial of petitioner's request No. 53 that:

"The zoning by-law is on its face and without reference to its particular application to the petitioner's land, void and of no effect in that it has no reasonable relation to the legitimate objects of the zoning power and is unreasonable, confiscatory and tantamount to a taking of property without payment of just compensation in violation of the Massachusetts and United States constitutions."

The petitioner designates Resp. Exhibit No. 6, (article 34) the zoning by-law in issue as necessary for this exception.

21. The petitioner took exception to the court's ruling that it "rules and determines that the zoning law enacted by the Town of Dedham at its annual town meeting in 1963 as described in Article 34 (Exhibit No. 6) and as indicated in the zoning map (Exhibit No. 3) and approved by the Attorney General on July 15, 1963 was a valid exercise of the authority and powers conferred upon the respondent Inhabitants of the Town of Dedham by General Laws, Chapter 40A and is in full force and effect as to the petitioner's land." (second paragraph of page 25 of Decision). [Now page 47.]

The petitioner designates as necessary for this excep-

tion the testimony and exhibits referred to throughout this bill of exceptions as being applicable.

22. The petitioner took exception to the court's denial of petitioner's request No. 55 that:

"Said zoning by-law is so vague and ambiguous as to be void under the Amendment 14th of the Constitution of the United States of America and Part the First, Article XII of the Constitution of Massachusetts."

The petitioner designates as necessary for this exception the zoning by-law in issue, Exhibit No. 6.

23. The petitioner took an exception to the allowance by the court of respondent's request No. 3, that:

"The town may adopt a flood plain zoning by-law without including in the record of its action a formal determination that all land placed in the flood plain district is deemed subject to seasonal or periodic flooding."

The petitioner designates as necessary for this exception the exhibits and testimony set forth under exception 2.

24. The petitioner took exception to the allowance by the court of respondent's request for ruling No. 7 that:

"Upon all the evidence a finding is required that Exhibit 49 accurately summarizes the level of the Charles River for one week periods during the years 1954 to 1967."

The petitioner designates as necessary for this exception the following:

Trans. Vol. 9, page 29 line 6 to page 34, through line 6; page 58, lines 5 to 8—Testimony of Robert Barrows—called by the Resp.

25. The petitioner took an exception to the court's allowance of the respondent's request No. 8 that:

"Upon all the evidence a finding is required that the plaintiff's land (except the high land along the highway and two islands) is in fact subject to seasonal or periodic flooding."

The petitioner designates as necessary for this excep-

tion the exhibits and testimony referred to in exception No. 10, above.

26. The petitioner took an exception to the allowance by the court of the respondent's request No. 10 that:

"The flood plain by-law is authorized by G. L. 40A, secs. 2 and 3."

The petitioner designates as necessary for this exception the following:

Resp. Exhibit No. 6 (article 34) The flood plain zoning by-law (in issue)

All the exhibits and testimony referred to in exceptions Nos. 10 and 11.

27. The petitioner took an exception to the allowance by the court of the respondent's request No. 17 that:

"The by-law is not unconstitutional as applied to the plaintiff's land."

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## APPENDIX E

### CHAPTER 40A MASS. G.L.

**§ 2. Authority to regulate; purposes; exceptions**

For the purpose of promoting the health, safety, convenience, morals or welfare of its inhabitants, any city, except Boston, and any town, may by a zoning ordinance or by-law regulate and restrict the height, number of stories, and size of buildings and structures, the size and width of lots, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, agriculture, residence or other purposes; provided, however, that no ordinance or by-law which prohibits or limits the use of land for any church or other religious purpose or for any educational purpose which is religious, sectarian, denominational or public shall be valid; and provided, further, that in regulating or restricting the size of such buildings or structures no provision of any ordinance or by-law shall be valid which requires the floor area of the living space of a single-family residential building to be greater than seven hundred and sixty-eight square feet.

For any or all of such purposes a zoning ordinance or by-law may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this chapter, and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, and structures, or use of land, and may prohibit noxious trades within the municipality or any specified part thereof. All such regulations and restrictions shall be uniform for each class or kind of buildings, structures or land, and for each class or kind of use, throughout the district, but the regulations and restrictions in one district may differ from

those in other districts. Due regard shall be paid to the characteristics of the different parts of the city or town, and the zoning regulations in any city or town shall be the same for zones, districts or streets having substantially the same character. A zoning ordinance or by-law may provide that lands deemed subject to seasonal or periodic flooding shall not be used for residence or other purposes in such a manner as to endanger the health or safety of the occupants thereof.

**§ 3. Reasons for regulation**

Zoning regulations and restrictions shall be designed among other purposes to lessen congestion in the streets; to conserve health; to secure safety from fire, panic and other dangers; to provide adequate light and air; to prevent overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; to conserve the value of land and buildings; to encourage the most appropriate use of land throughout the city or town; and to preserve and increase its amenities.

**§ 4. Exceptions to regulations; procedure for allowance**

A zoning ordinance or by-law may provide that exceptions may be allowed to the regulations and restrictions contained therein, which shall be applicable to all of the districts of a particular class and of a character set forth in such ordinance or by-law. Such exceptions shall be in harmony with the general purpose and intent of the ordinance or by-law and may be subject to general or specific rules therein contained. The board of appeals established under section fourteen of such city or town, or the city council of such city or the selectmen of such town, as such ordinance or by-law may provide, may, in appropriate cases and subject to appropriate conditions and safeguards,

grant to an applicant a special permit to make use of his land or to erect and maintain buidings or other structures thereon in accordance with such an exception. Before granting such a special permit the board of appeals, or the city council or the selectmen, whichever the ordinance or by-law provides, shall hold a public hearing thereon, notice of which shall be given in accordance with section seventeen.

* * *

§ 21

Any person aggrieved by a decision of the board of appeals may within twenty-one days after the decision is filed in the office of the city or town clerk bring a petition in the district court within the judicial district the land area to be affected is situated, addressed to the justice of the court praying that the action of the board of appeals may be reviewed by the court and after such notice as the court may deem necessary, it shall hear witnesses, review such action and determine whether or not upon all the evidence the decision exceeds the authority of the board. If the court finds that said decision was proper the action of the board shall be affirmed; otherwise it shall be annulled and the board shall be notified to change its records accordingly and to act in accordance with such decision.

Notwithstanding the provisions of the first paragraph of this section any person aggrieved by the decision of the board of appeals or of the district court, whether or not previously a party to the proceeding, and including any municipal officer, or planning board may appeal to the superior court for the county in which the land is situated, by filing a bill in equity within twenty days after the decision has been filed in the office of the city or town clerk or with the clerk of the district court hearing such matter. Written notice of such appeal together with a copy of the bill in equity shall be given to such city or town clerk within said twenty day appeal period. The bill shall allege

that the decision exceeds the authority of the board, and any facts pertinent to that issue, and shall contain a prayer that the decision of the board or of the district court be annulled. There shall be attached to the bill a copy of the decision appealed from, bearing the date of filing thereof, certified by the city or town clerk with whom the decision was filed.

* * *

**Pertinent Portions of By-Law Adopted by Town of Dedham at 1963 Annual Town Meeting:**

"That the Town amend the zoning by-law as follows:

"Under Section I. Establishment of Districts, I-1. Types of Districts, that the following District be added, '9. Flood Plain District,' and that the Zoning Map of said Town be amended by the addition of the Flood Plain Districts shown on a plan by Pilling Engineering Company and dated December 7, 1962.

"That after Section II-7, Industrial District Uses and before Section III, Accessory Uses, the following be inserted as Section II-8 'Flood Plain District Uses:

"The purpose of the Flood Plain District is to preserve and maintain the ground water table; to protect the public health and safety, persons and property against the hazards of flood water inundation; for the protection of the community against the costs which may be incurred when unsuitable development occurs in swamps, marshes, along water courses, or in areas subject to floods; and to conserve natural conditions, wild life, and open spaces for the education, recreation and general welfare of the public.

"Within a Flood Plain District no structure or building shall be erected, altered or used, and no premise shall be used except for one or more of the following uses: Any woodland, grassland, wetland, agricultural, horticultural, or recreational use of land or water not requiring filling. Buildings and sheds accessory to any of the Flood Plain

uses are permitted on approval of the Board of Appeals. Notice of each such Flood Plain building permit application shall be given to the Town Public Works Department, to the Town Board of Health, to the Town Planning Board, and to the Town Conservation Commission as well as all other parties required.

"The Board of Appeals, in hearing such application, shall consider, in addition to any other factors said Board deems pertinent, the following aspects with respect to flooding and Flood Plain District zoning provisions: that any such building or structure shall be designed, placed, and constructed to offer a minimum obstruction to the flow of water; and that it shall be firmly anchored to prevent floating away.

"If any land in the Flood Plain district is proven to the satisfaction of the Board of Appeals after the question has been referred to the Planning Board, the Board of Health, and the Board of Selectmen, and reported on by all three boards or the lapse of thirty days from the date of referral without a report, as being in fact not subject to flooding or not unsuitable because of drainage conditions for any use which would otherwise be permitted if such land were not, by operation of this section, in the Flood Plain district, and that the use of such land for any such use will not interfere with the general purposes for which Flood Plain districts have been established, and will not be detrimental to the public health, safety, or welfare, the Board of Appeals may, after a public hearing with due notice, issue a permit for any such use.

"Except as provided above, there shall be in the Flood Plain District:

"No land fill or dumping in any part of the District.

"No drainage other than Flood Control works by an authorized public agency.

"No damming or relocation of any water course except as part of an over-all drainage basin plan.

"No building or structure.

"No permanent storage of materials or equipment.

"In any Flood Plain District after the adoption of this provision, no land, building, or structure shall be used for sustained human occupancy except dwellings theretofore lawfully existing, or land, buildings or structures which comply with the provisions of this by-law.

"The areas . . . placed in 'Flood Plain District' at this time, are described (generally) as follows:

"A. The low lands bordering the Charles River, as shown on the map prepared by Pilling Engineering Co., entitled 'Proposed Flood Plain District' and dated 12/7/62, and designated as Area #1. . . ."

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COPY BOUND CLOSE IN CENTER

# Supreme Court of the United States.

OCTOBER TERM, 1972.

No. 72-663.

TURNPIKE REALTY COMPANY, INC.,
*Petitioner,*
*v.*
TOWN OF DEDHAM, MASSACHUSETTS,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

## BRIEF FOR RESPONDENT IN OPPOSITION.

**Opinions Below, Prior Orders of this Court and Jurisdiction.**

These matters are adequately set forth in the petition.

**Question Presented.**

Is there an unconstitutional taking of property when a town includes in a flood plain zoning district land which is subject to seasonal and periodic flooding, when the effect of that zoning is to limit the use of the land to buildings and activities appropriate to its character, and provides an administrative procedure for the exemption of land which is not subject to flooding or not unsuitable because of drainage conditions for an alternative use?

## Constitutional, Statutory and By-Law Provisions.

The relevant constitutional, statutory and by-law provisions are set out in the petition (Petition 3, 73-78).

## Statement of the Case.

This case involves the exercise by a town, pursuant to state statutory authorization, of the fundamental power to zone land within the town for uses which are appropriate to the character of the land itself and which are designed to preserve the health, safety, convenience, morals or welfare of the town's inhabitants. The town of Dedham, Massachusetts, amended its zoning by-laws in 1963 to create a flood plain district (which included the petitioner's land) and to provide rules for the use of the land in such a district.

The first paragraph of the by-law (Petition 76-78) states its central purpose "to protect the public health and safety, persons and property against the hazards of flood water inundation." Certain other purposes, including protection of the ground water table, avoidance of costs of unsuitable development, and conservation of natural resources, are also stated.

The second paragraph contains the principal use limitations imposed in flood plain districts: no structures may be built in such districts, and the land may be used only for woodland, grassland, wetland, agricultural, horticultural, or recreational purposes which do not involve filling.

The by-law contains two separate special permit provisions. The first, contained in the second and third paragraphs, allows buildings accessory to the permitted uses on approval of the local Board of Appeals. Such buildings must be appropriately designed for exposure to flooding. The second special permit provision, in the fourth paragraph of the by-law, permits exemption of any land in the district

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if the land is shown to be not subject to flooding, or "not unsuitable because of drainage conditions" for otherwise permitted uses, and if it is further found that exemption would not conflict with the purposes of flood plain zoning, including protection of the public health, safety and welfare.

The petitioner owns 61.9 acres of land which are included in the flood plain district. That land is composed of "lowlands covered with marshgrass and scrub growth," and includes two knolls within the marsh area containing 3.2 and .2 acres respectively (Petition 24-25). The trial court specifically found on the basis of extensive expert and other evidence, including a view of the locus, that there was a reasonable basis for the legislative determination that the land was in fact subject to "'seasonal' or 'periodic'" flooding (Petition 39). The evidence showed that the land was subject to flooding both before and after a flood control bascule gate was constructed in 1959 (Petition 16-17, 24-25). The trial court also found that the petitioner was not deprived of all use of its property and that "[a]lthough there was a substantial diminution in value" caused by the imposition of the flood plain zoning, the decrease in value did not constitute an unconstitutional deprivation of property (Petition 42).

Review of the decision of the Land Court by the Supreme Judicial Court is limited to questions of law and the trial court's findings of fact must stand if warranted by the evidence. *Lyon* v. *Parkinson,* 330 Mass. 374, 375 (1953). The Supreme Judicial Court agreed with the Land Court that the evidence showed periodic or seasonal flooding (Petition 24-25), which was not artificially caused (Petition 16-17), and that the evidence did not show such a decrease in value as to constitute an unconstitutional taking of the petitioner's property (Petition 27).

The last three paragraphs of the petitioner's statement of the case (Petition 5) state as facts certain assertions by

the petitioner which were expressly or impliedly rejected by the Land Court and which the Supreme Judicial Court ruled the trial court was warranted in rejecting. Both courts refused to find that the flooding of the petitioner's land was artificially caused (Petition 16-17, 24-25, 52 (denying Petitioner's Request No. 21)), that the primary purpose of the flood plain by-law was improper (Petition 15-16, 52 (denying Petitioner's Requests Nos. 26, 48, 49, 52 and 53)), or that the value of the petitioner's land was decreased 88 per cent by the zoning (Petition 26-27, 42). Finally, the statement that interested developers have been deterred by the flood plain zoning (Petition 9, n. 3) has no foundation in the findings of either court.*

Similarly, the petitioner's statement of the questions presented (Petition 2-3) improperly states as facts portions of evidence which the trial court and the Supreme Judicial Court did not accept.

## Argument.

### I. The Constitutional Questions Raised by the Petitioner have All been Ruled upon Repeatedly by this Court and were Decided Below in Conformity with the Decisions of this Court.

The exercise of the zoning power to limit the use of land within the flood plain is a comparatively new type of regulation, the importance of which has only recently been generally recognized. It does not, however, raise any legal issues which have not been previously determined by this Court. The exercise of the police power involved in local

* The fact that the petitioner did not develop its land in any way from 1947 to 1963 when the by-law was enacted (Petition 4), suggests that it is the character of the land, not the flood plain zoning, which prevents such development.

zoning regulations was first sustained in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386-395 (1926). The Court there recognized that modern developments may make necessary restrictions on the use of private property which might a century ago have been deemed unreasonable. 272 U.S. at 387. The effect of changing conceptions of the public welfare was recognized more recently in *Berman* v. *Parker*, 348 U.S. 26, 33 (1954). In that case the Court restated the modern view of the constitutional limitation upon the exercise of the police power as follows (348 U.S. at 32):

> "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." (Citations omitted.)

These well-established general standards of review were applied by the Massachusetts Supreme Judicial Court in this case (Petition 23-24).

The essential ingredient of the petitioner's claim that it has been denied due process is that an unconstitutional taking of its property has occurred. The only evidence it offered to support this claim was an asserted decrease in market value of the zoned land. The decisions of this Court are clear that comparisons of value are "by no means conclusive" on the question of an unconstitutional taking. *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962). In *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 384 (1926), an asserted decrease of 75 per cent was not found to be an unconstitutional taking, and in *Hadacheck* v. *Sebastian*, 239 U.S. 394, 405, 410-411 (1915), evidence of a claimed decrease of 92.5 per cent was not sufficient.

The reason for not accepting value comparisons as the sole basis for the decision of constitutional issues was stated 85 years ago in *Mugler* v. *Kansas*, 123 U.S. 623, 668-669 (1887): it would permit a property owner to complain that he has been deprived of the benefit of a value which was based on injury to the public interest. The flood plain by-law in this case, as the Supreme Judicial Court held (Petition 19, 25), prevents the petitioner from using the land in ways which would threaten the health, safety and welfare of persons on the land itself, or of others living in areas of slightly higher elevation who would be threatened by increased flooding caused by the misuse of the petitioner's land. The by-law, however, permits the petitioner to use its land in ways which do not have such deleterious consequences (Petition 25-26).

In addition to its central argument that the by-law is unconstitutional because it decreases the value of its land, the petitioner relies on certain ancillary legal issues. It argues that the purpose of the flood plain zoning by-law to protect the community against "costs which may be incurred . . . [from] unsuitable development" is too "narrowly circumscribed" to meet the standards established in decisions of this Court. The case the petitioner cites for that proposition, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), however, relied among other considerations on the potential savings in the cost of local street construction. 272 U.S. at 391. In any event, the Massachusetts court ruled that community-wide expenses, like public works, disaster relief, or injury to others in the community from increased flooding if the petitioner's land were filled, all might be considered in deciding whether a flood plain zoning by-law served the public welfare (Petition 25). That holding is clearly in accord with the broad scope given to the police power in later decisions of this Court. E.g., *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).

The petitioner also complains of the treatment of the two knolls, of 3.2 and .2 acres respectively, which were included in the flood plain district. It states (Petition 9, n. 3) that the Supreme Judicial Court found their inclusion to be inadvertent, when in fact that court only noted that the trial court had concluded that the inclusion "may" have been inadvertent (Petition 28), and went on to support the inclusion in any event. This Court, like the Massachusetts Court (Petition 21), has recognized that zoning must apply to general areas, even if it results in restrictions on particular sites which do not require the limitations. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387-389 (1926).

The Dedham by-law also contains an administrative procedure for exemption of land which is not in fact subject to flooding or, due to drainage conditions, is not unsuitable for otherwise permitted uses (Petition 21, 28), which adequately protects the petitioner's rights with respect to the knolls. The petitioner chose not to seek exemption of the knolls under that provision, but instead to contest the validity of the entire by-law. Although the Massachusetts statutes (G.L. c. 240, § 14A) permit such a broad challenge to be made (cf. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 386 (1926)), it does not follow that the petitioner's own failure to seek an appropriate administrative remedy can be used as the basis for an argument that the entire by-law is unconstitutional. See *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926). As the Land Court noted, the exercise of the administrative mechanism must be presumed regular until experience proves otherwise (Petition 47). Cf. *In re Groban*, 352 U.S. 330, 334 (1957). In any event, this Court should not exercise its certiorari powers to review the determination of a trial court as to the precise location of a zoning district boundary in Dedham.

Similarly, the petitioner's assertion that there are not sufficient standards for the exercise of the power of the

local Board of Appeals to grant exemptions raises no issue warranting review by this Court. The Massachusetts decisions applied by the Supreme Judicial Court (Petition 22) are clearly in accord with the decisions of this Court with respect to standards for the exercise of delegated authority. E.g., *Berman* v. *Parker*, 348 U.S. 26, 35 (1954).

## II. The Issues of Fact Determined by the Courts below Foreclose the Petitioner's Arguments.

Although the petitioner claims to be seeking certiorari from this Court for the review of legal issues, it is actually attempting to obtain review of fact determinations made against it in the trial court and sustained by the Supreme Judicial Court. In the absence of special circumstances (not here present) this Court will not reject state court findings of fact when there is evidential support in the record for such findings. *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1952). While the findings of fact concerning certain issues, such as the change in value of the land, are not as detailed as may be desirable, it is well established that this Court will "assume, so far as the state of the record permits, that [the state courts] . . . adopted such a basis of fact as would most clearly sustain [their] . . . judgment on the federal constitutional issue. *Reinman* v. *Little Rock*, 237 U.S. 171, 180 (1915). This situation is an example of the more general principle that in the absence of specific findings of fact and where the evidence is conflicting this Court will assume findings were made below to support the judgment under review. *McKinley Creek Mining Co.* v. *Alaska United Mining Co.*, 183 U.S. 563, 569 (1902).

The petitioner also argues that it should be permitted to show that certain of the stated purposes of the flood plain zoning by-law, particularly the protection of health and safety, are not actually accomplished by the provisions of the by-law. It erroneously suggests that the Supreme

Judicial Court did not deal with that question (Petition 11). In fact, that court did consider the matter directly and said that the necessity of such zoning to reduce damage to life and property was "unquestionable" (Petition 24). It has been settled for over 60 years in cases of this kind that the factual basis for local legislative judgments, upheld by the state courts, will not be casually disregarded by this Court on review. *Laurel Hill Cemetery* v. *San Francisco,* 216 U.S. 358, 365 (1910). See also *Gorieb* v. *Fox,* 274 U.S. 603, 609 (1927).

In any event, the petitioner has raised its theory concerning the failure of the by-law to achieve its purposes too late. At trial and on appeal, the petitioner's contention was not that the purposes stated in the by-law could not be accomplished by its provisions, but that other purposes were the true motivation for passing the by-law.* This can be readily seen by review of the requests and exceptions which the petitioner designates as preserving the issue (Petition 6, ¶4). The distinction is more than semantic, since the petitioner's position below did not require it to show that the by-law could not achieve its stated purposes, but only to show that some supporters of the by-law emphasized the conservation purposes. As a result, no evidence to show that the by-law would not protect the public health and safety was introduced by the petitioner or reported on appeal. The petitioner has the heavy burden of showing that the by-law's purposes are not achieved by its restrictions. When no evidence to that end is present, the by-law must be upheld. *Goldblatt* v. *Hempstead,* 369 U.S. 590, 596 (1962). The same rule of constitutional adjudication was applied by the Supreme Judicial Court (Petition 23-24).

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* In seeking certiorari, the petitioner is forced to alter its theory, in the face of the well-established line of decisions that ulterior motives of the legislative body will not be considered. *Flemming* v. *Nestor,* 363 U.S. 603, 617 (1960).

III. This Court has Regularly Denied Certiorari to Cases Raising the Issues Contained in this Petition.

Landowners whose property has been subject to zoning restrictions have had little success in obtaining certiorari in cases where, as in this petition, the foundation of their claim to unconstitutional deprivation of property was a decrease in value. In *Consolidated Rock Products Co.* v. *Los Angeles,* 57 Cal. 2d 515, 530, appeal dismissed per curiam for want of substantial federal question, 371 U.S. 36 (1962), this Court declined to hear a case in which it was alleged that the zoning restrictions deprived the owners of substantially all the value of their land. Similarly, in *McCarthy* v. *Manhattan Beach,* 41 Cal. 2d 879, 890-891 (1953), cert. denied, 348 U.S. 817 (1954) (zoning regulation restricting beach front property to recreational uses), although no evidence of actual value changes had been introduced, the essence of the claim was an unconstitutional deprivation of property. See also *St. Paul* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.,* 413 F. 2d 762 (8th Cir.), cert. denied, 396 U.S. 985 (1969).

## Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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